STATE OF MICHIGAN
SUPREME COURT

Plaintiffs-Appellees appeal from the Michigan Court of Appeals
The Hon. Amy Ronayne Krause, Henry William Saad and Kurtis T. Wilder
Per Curiam

ANTHONY HENRY and KEITH WHITE,

Plaintiffs-Appellees,

vs.

d/b/a LABORERS LOCAL UNION 1191 ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 and MICHAEL AARON and BRUCE RUEDISUELI,

Defendants-Appellants.

and

BRUCE RUEDISUELI,

Defendant,

and

MICHAEL RAMSEY and GLENN DOWDY,

Plaintiffs-Appellees,

vs.

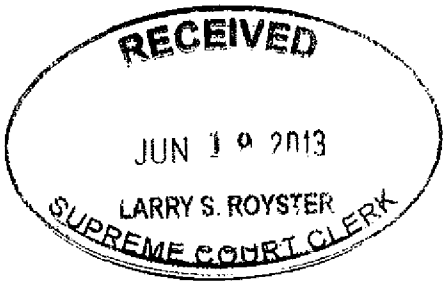
LABORERS' LOCAL 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 and MICHAEL AARON,

Defendants-Appellants.

and

BRUCE RUEDISUELI,

Defendant.



Supreme Court No.: 145631

Court of Appeals No.: 302373

Wayne County Court Circuit
No.: 10-000384-CD

Wayne County Circuit Court
Hon.: Jeanne Stempien

PLAINTIFFS-APPELLEES APPEAL BRIEF

ORAL ARGUMENT REQUESTED

Supreme Court No.: 145632

Court of Appeals No.: 302710

Wayne County Circuit Court
No.: 10-004708-CD

Wayne County Circuit Court
Hon. Jeanne Stempien

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STATEMENT OF THE BASIS OF JURISDICTION

The jurisdictional summary and standard of review stated in the Defendants-Appellants Brief is complete and correct.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Regardless of the public body involved, does the LMRDA preempt the WPA?

   The trial court answered: **No.**

   Court of Appeals answered: **No.**

   Plaintiff-Appellees answer: **No.**

   Defendant-Appellants answer: **Yes.**

2. Regardless of the public body involved, does the NLRA preempt the WPA?

   The trial court answered: **Not presented with issue**

   Court of Appeals answered: **No.**

   Plaintiff-Appellees answer: **No.**

   Defendant-Appellants answer: **Yes.**

3. Is a union employee's report to a public body only of peripheral concern to the NLRA or the LMRDA so that the employee's interests are not preempted by federal law?

   The trial court answered: **Yes*.**

   Court of Appeals answered: **Yes.**

   Plaintiffs-Appellees answer: **Yes.**

   Defendants-Appellants answer: **No.**

4. Is the state's interest in enforcing the WPA so deeply rooted that, in the absence of compelling congressional direction court cannot infer that Congress has deprived the state of power to act?

   The trial court answered: **Yes.**

   Court of Appeals answered: **Yes.**

Plaintiffs-Appellees answer:	**Yes.**
Defendants-Appellants answer:	**No.**

*Defendants did not raise NLRA preemption as an issue before the trial court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Whistleblower Protection Act (WPA) case arose when Plaintiff-Appellees Anthony Henry and Keith White were fired as employees of Defendant-Appellant Union because they reported their suspicions of union corruption to law enforcement. Specifically, Plaintiffs informed the United States Department of Labor (DOL) that they suspected their boss, Defendant-Appellant Michael Aaron, had misappropriated union funds and received kickbacks for supplying unemployed members to perform demolition work on a bar known as the "TULC". The Wayne County Circuit Court rejected Defendants' argument that the Labor Management and Reporting Disclosure Act (LMRDA) preempted Plaintiffs' WPA claims. The Court of Appeals affirmed the trial court's ruling and additionally held that Plaintiffs' WPA claims were not preempted by the National Labor Relations Act (NLRA) under *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,* 359 US 236 (1959).

Both lower courts recognized that the core purpose of the LMRDA is to promote union democracy and curb corruption by union leadership. In *Finnegan v. Leu,* 456 US 431 (1982), the Supreme Court held that the LMRDA *only* protects union members, *not* employees. As noted by the trial court and Court of Appeals, Plaintiffs were discharged as *employees* and sought no vindication of any membership rights. Assuming *arguendo* that the LMRDA somehow applied, both lower courts agreed there was no preemption because the WPA is complimentary to-and does not impede or conflict with-the core purpose of the LMRDA.

Defendants also argue that the NLRA preempts Plaintiffs' state WPA claims. In their Circuit Court and Court of Appeals briefs, Defendants repeatedly admitted that Plaintiffs' WPA

retaliation claims were based on their reports of union corruption. (78a, 81a, 83a, 84a, 86a-87a[1], 90a, 91a; 571a, 572a, 588a, 614a, 620a-623a.) Now, Defendants excise virtually any reference to Plaintiffs' reports of suspected union corruption or kickbacks to law enforcement. Instead, Defendants allege that Plaintiffs' reports were limited exclusively to work conditions, safety concerns and wages for the TULC volunteers. From these sanitized facts, Defendants' argue that the NLRA preempts Plaintiffs' WPA suit.

Defendants' argument is without merit because the NLRA provides no protection for the TULC volunteers—the persons Defendants erroneously allege Plaintiffs were trying to protect. Even if this Court were to assume that the NLRA "arguably" applies (which it does not) to the retaliatory discharge, there is still no federal preemption. Under the seminal United States Supreme Court case of *San Diego Bldg. Trades Council v. Garmon, supra*, there is no preemption because Plaintiffs' WPA action is peripheral to the core concerns of the NLRA, which are to preserve industrial peace and promote collective bargaining. This case has absolutely nothing to do with union busting, unionizing activities, interpretation of a collective bargaining agreement, or the like. Moreover, neither Plaintiffs nor Defendants ever filed a charge with the National Labor Relations Board (NLRB) which eliminates any danger that state court

[1] In the trial court, Defendants Brief in Support of Motion for Summary Disposition explained Plaintiffs' claims as follows: "Plaintiffs now claim that they made their union 'corruption' charges to the USDOL. This contact with the USDOL, Plaintiffs claim, and their participation in the USDOL follow-up investigation, prompted their retaliatory discharge." (86a-87a.) In their Brief on Appeal filed with this Court, Defendants alter course and now characterize Plaintiffs' claims as follows: "Plaintiffs Henry and White claim that their report to the USDOL about wages and terms and conditions of employment and their participation in the USDOL's later investigation, prompted their retaliatory discharge." (Brief on Appeal, p. 13.) While the former characterization of Plaintiffs' claim is accurate the latter is not.

jurisdiction over this WPA case will undermine or conflict with any finding or action by the NLRB.

There is also no *Garmon* preemption because the WPA touches interests deeply rooted in local feeling and responsibility. Undeniably, Michigan's interest in protecting its' citizens from retaliation by their employer is substantial. The statute makes no exceptions for labor unions. If, however, this Court were to adopt Defendants' position, unions would essentially be immune from WPA liability. This is not the intention of the WPA, the NLRA or any federal statute. This Court, therefore, should affirm.

COUNTER-STATEMENT OF FACTS

A. Structure of Local 1191 and the Parties' Positions of Employment with the Union.

Laborers' Local 1191 (Local 1191) is a labor union located in Detroit, Michigan. In May of 2009, Defendant Michael Aaron became the Business Manager of Local 1191[2]. (199a-200a.)

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[2] Defendants spend considerable time discussing Plaintiffs' motives in reporting Aaron's suspected criminal conduct to law enforcement. (Brief on Appeal, pp. 7, 9-10.) In *Whitman v. City of Burton,* 2013 Mich LEXIS 682, *1-*2 (2013), this Court held that a whistleblower's motivation is irrelevant to the question of protected activity:

> Nothing in the statutory language of the WPA addresses the employee's motivation for engaging in protected conduct, nor does any language in the act mandate that the employee's *primary* motivation be a desire to inform the public of matters of public concern. Rather, the plain language of MCL 15.362 controls, and *we clarify that a plaintiff's motivation is not relevant to the issue whether a plaintiff has engaged in protected activity and that proof of primary motivation is not a prerequisite to bringing a claim. To the extent that Shallal has been interpreted to mandate those requirements, it is disavowed.* Accordingly, we reverse the judgment of the Court of Appeals and remand this matter to that Court for consideration of all remaining issues, including whether the causation element of MCL 15.362 has been met. (Italics added.)

Any questions concerning Plaintiffs' alleged motivations in reporting to the DOL are irrelevant.

Defendant-Appellant Bruce Ruedisueli was the Local's Vice President. (511a.) Plaintiff Anthony Henry was employed by Local 1191 as a Business Agent, as was Plaintiff Keith White. Mr. White also worked as Local 1191's dispatcher. (311a, 512a.) Both were union members.

Michael Ramsey and Glenn Dowdy, Plaintiff-Appellees in the companion case, were also Business Agents employed by Local 1191. (450a.) They too, were union members.

B. Henry's and White's Reports of Corruption to the DOL.

In early September of 2009, Business Manager Aaron instructed White to contact several unemployed union members for "training". (294a-295a; 375a-380a.) Unbeknownst to Plaintiffs, when the workers arrived at the union hall, they were advised there was no "training" and were asked to "volunteer" to remove a brick façade on the exterior of the Trade Union Leadership Council (TULC) building[3]. (294a-295a.)

Henry videotaped the "training" for posting on Local's 1191's planned website. (122a.) Henry incidentally observed that members working on the TULC lacked proper clothing and safety equipment. (405a, 407a.)

The TULC project lasted two days. Checks from Local 1191's treasury were issued for $60.00 to each of the eight "volunteers." (388a-395a; 294a-295a.) Plaintiffs suspected unlawful activity when they found these checks falsely attributed to "picket line 2 days." None of the recipients had participated in a picket line[4]. (152a-156a, 158a-160a, 373a, 375a, 380a-383a,

[3] The TULC is a private entity separate and distinct from Local 1191. It is licensed to sell liquor and frequented by union members and members of the public. (386a.)

[4] Local 1191 Business Agent Duane Robinson, now deceased, testified that Mr. Ruedisueli was reluctant to sign the checks, "[b]ecause they had 'picket line' on them, and he knew them guys wasn't on a picket line." (417a.) Mr. Ruedisueli also admitted to Mr. White that he believed the checks were fraudulently issued. (382a-384a.)

401a-408a.) Plaintiffs also understood that if the checks were for "training" they should have been issued from the Michigan Laborer's Training Institute, *not* from Local 1191's treasury. *Id.* If the work was for hire, these members should have received wages from the contractor in accordance with an agreement negotiated between the union and the contractor[5]. (373a-377a.) Plaintiffs suspected that Aaron had misappropriated Local 1191 funds to further a kickback scheme whereby he received cash for providing free labor to the TULC. (373a-377a, 382a-384a, 404a-405a, 407a-408a.)

C. Henry's Anonymous Letter to Local 1191 Membership.

On September 25, 2009, Mr. Henry drafted and sent an unsigned letter to Local 1191 in which he outlined his suspicions that Aaron misappropriated union funds and was engaged in a kickback scheme. (404a, 419a-424a.) Misappropriation and embezzlement are felonies under 29 USC § 501(c)[6] and MCL 750.174, respectively.

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[5] Immediately above their "Introduction," Defendants refer to Keith White's deposition where he discussed that, typically, union wages are paid to workers pursuant to a collective bargaining agreement negotiated between the employer and the union. (Brief on Appeal, p. 1.) Defendants refer to this testimony to insinuate that this case involves a collective bargaining agreement. It does not. It is undisputed that neither Plaintiffs nor the TULC volunteers worked under a collective bargaining agreement and no such agreement is attached to Defendants' 1100 page appendix.

[6] 29 USC § 501(c) provides:

> Any person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the monies, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

The September 25, 2009 letter referred to 29 USC § 501(c), LMRDA, which is a criminal statute. *§ 501* deals with the fiduciary duties of union officers and guards against the misuse of union funds. (419a-427a.) In addition 29 USC § § 6012 and 6015 require a taxpayer to declare and pay income. If Plaintiffs' concerns of kickbacks were accurate and the receipt of such payments went undeclared by Aaron, that would also violate state and federal laws governing the reporting of income.

D. Plaintiffs Report Their Suspicions of Illegal Activity to The Department of Labor (DOL).

In October 2009, Plaintiffs met with criminal investigators from the DOL to report their suspicions of Aaron's kickback scheme. (118a-120a, 294a-295a, 398a-399a, 402a-403a, 409a, 435a.) On October 19, 2009, the DOL began a criminal investigation into the activities of Local 1191 and Aaron. (294a-295a.) The DOL conducted interviews with several employees of Local 1191, including Aaron. (138a, 294a-295a.)

The DOL Investigative report explained the "*Nature of the Scheme*" reported by Plaintiffs:

> On October 19, 2009, this office opened an investigation based on allegations that Aaron, the President/Business Agent for LIUA LU 1991, stole or misused strike/picket funds in order to reimburse certain LU 1191 members who assisted on a demolition project at the Trade Union Leadership Council (T.U.L.C.); a private Detroit union-member-only club. The union contacted certain members and asked them to volunteer work/volunteer by removing a brick façade on the exterior of the building. The LU 1191 members agreed to work/volunteer; however, all of the workers initially believed that they would be attending a training seminar at the LU 1191. When the workers arrived at the LU 1191, they were advised there would be no training and that they were needed to volunteer on the project at the T.U.L.C. About one to two weeks after the project at the T.U.L.C. had been completed; the members received a check in the mail from LU 1191. All of these checks were from the picketing fund. None of the members who worked at the T.U.L.C. project had picketed. The members were informed that the picket line was to assist them with their transportation expenses while working on this volunteer project on behalf of LU 1191.
>
> Michael Aaron was interviewed and advised that he authorized checks to be issued to members that had worked on the T.U.L.C. project. Aaron stated that it was within his discretion to issue the checks from the picket fund. The total amount paid to members was less than $500.00. The AUSA [redacted].

(294a-295a.) This Investigative Report makes no reference to wages, clothing or unsafe working conditions because that was not the substance of Plaintiffs' reports or the focus of the DOL's criminal investigation.

E. Attorney Legghio's Internal Investigation of Union Corruption Alleged in the September 2009 Letter.

On behalf of Local 1911, its attorney, Christopher Legghio, "investigated" Plaintiffs' allegations of corruption and kickbacks described in the September 25, 2009 letter. (440a-441a.) On November 5, 2009, Mr. Legghio issued a letter which declared that "we find no violations of federal or state law." (440a.) Mr. Legghio offered the following basis for his findings:

> There is no evidence whatsoever that any Local 1191 Union officer misused their position or received any personal gain from the modest work performed at the TULC by Local 1191 ***members who volunteered*** to do this work. And, there is ***no evidence that any laborer was compelled to work at the TULC***. All of the laborers, who performed any work at the TULC, did so ***voluntarily.***
>
> The modest payments to the laborers ($30 per day) referenced "picket line" activity. But there is no evidence that this reference was an effort to mislead anyone as to the nature of the payment. Rather, this reference appears merely inadvertent[7].
>
> Instead, the evidence is that ***some unemployed Local 1191 members voluntarily worked,*** for a short time, at the TULC. Local 1191 provided these ***unemployed volunteers*** with a modest daily stipend for their ***volunteered efforts***. This explains why the Local called the Local 1191 members to perform this ***volunteer work***—it presented an opportunity to provide ***unemployed Local 1191 members*** with some modest ***compensation for their unselfish efforts. Stated another away, the modest stipend paid to these Local 1191 members who volunteered their time and work is nothing more than [sic] the Local's effort to modestly reimburse unemployed Local 1191 members for their expenses when they voluntarily donated their work to this cause.***

(441a[8].) (Italics/Bold added.)

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[7] One might wonder what a neutral fact finder might conclude about repeated false entries on checks which serve no purpose other than to mislead. A neutral fact finder might also conclude that the omission of any reference to "training" in this letter was also not "merely inadvertent" but rather, more subterfuge.

F. Plaintiffs Termination Because They Reported Suspected Illegal Activity to the Law Enforcement.

On November 11, 2009, just six days after the publication of Mr. Legghio's "findings and recommendations", Aaron sent each Plaintiff a letter which advised: "[I]n order to prudently manage Local 1191's finances...you will not return to work at Local 1191 until notified by Local 1191." (445a, 447a.) No other reason for Plaintiffs' termination was given. *Id.*

G. Plaintiffs' WPA Lawsuit and the Firings of Ramsey and Dowdy.

On January 12, 2010, Plaintiffs filed their WPA Complaint, since amended, in Wayne County Circuit Court. Plaintiffs alleged that they were fired for reporting their suspicions of Aaron's fraudulent and illegal activity to the DOL. (3a-8a, 25a-32a, 198a.) Plaintiffs filed this action as "employees," not as members of the union. *Id.* They sought no vindication of any membership rights and made no reference to any federal statute. *Id.*

Business Agents Ramsey and Dowdy also suspected Aaron of orchestrating a kickback scheme. (198a.) Defendants scheduled Ramsey and Dowdy's depositions for the first week of April, 2010. Mr. Ruedisueli asked Mr. Ramsey to lie at his deposition. (458a-461a, 467a-470a.) Mr. Ramsey refused. (453a-454a.) Soon after, Ramsey and Dowdy were fired. *Id.* On April 22, 2010, Ramsey and Dowdy filed their WPA lawsuit. (449a-456a.) Count II of their Complaint contained a claim for wrongful discharge in violation of public policy for Ramsey's refusal to commit a criminal act (i.e., perjury) at the direction of Defendant Ruedisueli. (454a.)

H. Defendants Motion for Summary Disposition.

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[8] During discovery, Defendants reiterated that checks "made payable to those who voluntarily worked on the TULC ... were not for 'work performed.'" (136a; Also See, 135a.)

Before the close of discovery, Defendants filed a motion for summary disposition pursuant to MCR 2.116(C) (4). (70a-71a.) In their Brief, Defendants argued that the LMRDA preempted Plaintiffs' state WPA claims "...because federal district courts have exclusive jurisdiction of retaliation claims by union members who exercise their LMRDA rights to *report union corruption* to the USDOL." (90a[9].) (Italics added.) In their trial court brief, as they do again here, Defendants relied heavily on the majority opinion authored by Judge Wilder in *Packowski v. United Food and Commercial Workers,* 289 Mich App 132 (2010). *Id.*

Defendants also filed a motion for partial summary disposition with regard to the *Ramsey/Dowdy* complaint which sought dismissal of the WPA claims but conceded that Mr. Ramsey's public policy claim was not preempted by the LMRDA. (189a-190a.)

The *Henry/White* and *Ramsey/Dowdy* plaintiffs filed a *Joint Brief in Response to Defendants' Motion for Summary Disposition and Partial Summary Disposition.* (347a-366a.) Plaintiffs argued that: (1) *Packowski* expressly limited its review and holding to the issue of just-cause employment and had nothing to do with *any* Michigan statutory claim, including the WPA (which was never even mentioned in *Packowski*); (2) the WPA is a codification of Michigan public policy in which the State has a deeply rooted interest in encouraging and protecting employees who report suspected illegal activity by their employers to law enforcement--including corruption by union leadership; (3) the WPA is consistent with and advances the dual purposes of the LMRDA; namely, to promote democracy and stop union corruption; (4) the savings provisions contained in the LMRDA preserved Plaintiffs' state law remedies to the

[9] Nowhere in their trial court or Court of Appeals Brief did Defendants claim that Plaintiffs were discharged because they complained about union wages or work safety or to aid or protect the TULC volunteers. Nor did Defendants argue that the NLRA preempted Plaintiffs' WPA claims.

extent the federal statute applied and (5) *Packowski's* reference to § 412 of the LMRDA was nothing more than *obiter dicta. Id.*

I. The Trial Court's Denial of Defendants' Motions.

The trial court rejected Defendants' motion. (602a-603a.) The trial court found that the LMRDA did not preempt Plaintiffs' WPA claims because: (1) the *Packowski* majority twice stated that the *only* question for review was whether the business agent's discharge violated his union employer's just-cause standard–a claim not present in either the *Henry/White* or *Ramsey/Dowdy* cases (*Packowski, supra,* at 134[10], 136[11]); (2) *Packowski* did not involve a WPA claim; (3) the WPA codified Michigan public policy and was consistent with the policy underlying the LMRDA; (4) the savings provisions of the LMRDA preserved Plaintiffs' state claims, and; (5) *Packowski's* reference to § 412 of the LMRDA in footnote 3 was *not* the court's holding, nor did it preempt state subject matter jurisdiction.(588a-594a.)

J. The Court of Appeals Affirms the Ruling of the Trial Court.

After entry of the *Order Denying Defendants' Motion for Summary Disposition*, The Court of Appeals granted Defendants Application for Leave to Appeal. (742a.) Following the submission of briefs and oral argument, a panel of the Court of Appeals comprised of Judges Krause, Saad and Wilder, affirmed the trial court's ruling. *Henry v. Laborers Local 1191,* 2012 Mich App LEXIS 1319 (July 12, 2012, Unpublished) (**Ex. A.**) (866a-891a.)

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10 "The sole issue before us on appeal is plaintiff's claim that he was terminated without just cause."

11 "This appeal involves the defendant's summary disposition motion regarding plaintiff's cause of action involving wrongful termination in violation of defendant's just-cause policy."

In their *per curiam* opinion, the Court of Appeals thoroughly analyzed preemption principles and the purposes underlying the WPA, LMRDA and NLRA. The Court found "[o]f particular significance, plaintiffs' claims arose out of their employment by Local 1191." *Id.* at *5. This court recognized that the LMRDA protects the rights of rank-and-file members, not the rights of union employees." *Id.* at *5-*6, citing *Finnegan v. Leu,* 456 US 431, 435, 437, 441; 29 USC §§ 411-415.

The Court of Appeals then clarified what *Packowski* did, and did *not*, hold:

> Significantly, however, *Packowski* only considered the "plaintiff's claim that he was terminated without just cause." *Id.* at 134. Consequently, an exception to preemption, recognized in other cases, where a union employee claims wrongful discharge for refusing "to commit or aid in committing a crime," did not apply because the plaintiff in *Packowski* was terminated for failing to follow legitimate policies, not for refusing to commit or aid in committing a crime. *Packowski,* 289 Mich App at 146. This Court also noted that any claim for retaliation for participating in the Department of Labor investigation could be brought in federal court under § 412. *Packowski,* 289 Mich App at 146 n 3. *This Court did not purport to decide whether doing so was the only way for such a party to seek relief, and we likewise do not so here.* (Italics added.)

Henry, supra at *6-*7. The Court rejected Defendants' argument that *Packowski* preempted Plaintiffs WPA claims.

The Court, *supra* at *7-*8, next discussed why Plaintiffs' WPA claims were not conflict preempted by the LMRDA:

> We appreciate Defendants' concerns that a patronage suit *could* masquerade as some other wrongful discharge suit, so it's especially important for plaintiffs to show a causal connection between their reporting and the discharge in order to the establish their prima facie case. [Citation omitted]. Furthermore, "[t]he trial court must exercise caution...to minimize introduction of any evidence that Plaintiff's political views differed from those of [the Business Manager] in order "to assure that the doctrine of preemption is not violated." *Montoya,* 755 P2d at 1224. However, plaintiffs contended that defendant's acts were criminal and involved more than "the federal regulatory scheme and the union's own internal operating policies." *Dzwonar,* 348 NJ Super at 173. Protecting terminations

> where an employee reports a crime, thereby refusing to conceal it, would also "encourage and conceal" criminal acts and coercion "and would not "serve union democracy." *Bloom v Gen Truck Drivers, Office Food & Warehouse Union, Local 952,* 783 F2d 1356, 1362 (CA 9, 1986). Accordingly, plaintiffs' WPA claim is not conflict preempted by the LMRDA.

The Court also found no field preemption and noted that "in general the LMRDA protects the rights afforded union members because of their status as *members,* not the rights afforded *union employees* because of their status as employees." *Packowski,* 289 Mich App at 152 n. 1 (Beckering, P.J., dissenting), (italics in original) citing *Finnegan,* 456 US at 436-437. "Here, plaintiff's brought their claims as employees and have not alleged any infringement on their membership rights, so they have no cause of action under § 412. See *Bloom,* 783 F2d 1359. [footnote omitted.]" *Henry, supra* at *8-*10.

Lastly, the Court rejected Defendants' new argument that Plaintiffs' WPA claims were preempted by the NLRA. The Court discussed NLRA preemption as explained in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,* 359 US at 245. The Court recognized that *§ 8* of the Act provided protection for unfair labor practices such as refusing to fire organizing workers, testifying before the NLRB or assisting in an NLRB investigation. *Henry, supra* at *10, citing *Calabrese v. Tendercare of Mich, Inc,* 262 Mich App 256, 260, 262-263 (2004); *Flores v. Midwest Waterblasting Co,* 1994 Dist LEXIS 17704 (DC MI 1994) (**Ex. B**) at *26 and *26 n 4 (NLRA does not exempt state whistleblower claims when an employee reports to an agency other than the NLRB). The *Henry* court found that Plaintiffs were not involved in anti-union activities and never filed any charge with the NLRB. The Court further ruled:

> Alternatively, in *Roussel v. St Joseph Hosp, 257 FSupp 2d 280, 285 (D Maine, 2003)*, the court found that a Maine Whistleblowers' Protection Act claim was not preempted by the NLRA. The court found that even if the plaintiff had engaged in concerted activity, her claim that she was terminated in retaliation for exercising her rights under the Maine Whistleblowers' Protection Act was peripheral to the NLRA. *Id.*
>
> Plaintiffs asserted that they reported their "suspicions of illegal activity" to either the United States or Michigan Department of Labor, not to the NLRB. Furthermore, we agree with the reasoning in *Roussel*. A claim for retaliatory discharge arising out of an employee's report of suspected illegal activity or participation in investigation thereof is only of peripheral concern to the NLRA's purpose of protecting employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Roussel, 257 F Supp 2d at 285*. Therefore, plaintiffs' WPA claims are not preempted.

Henry, supra at *12-*15.

K. This Court Grants Defendants' Application for Leave to Appeal.

Defendants filed an Application for Leave to appeal to this Court. (606a-637a.) On February 13, 2013, this Court granted Defendants application and instructed the parties to address the following questions: (1) whether, regardless of the public body involved, the NLRA or the LMRDA preempt the WPA, if the challenged conduct actually or arguably falls within the jurisdiction of the NLRA or the LMRDA; (2) whether a union employee's report to a public body of suspected illegal activity or participation in an investigation thereof is of only peripheral concern to the NLRA or the LMRDA so that the employee's claims under the WPA are not preempted by federal law; and, (3) whether the state's interest in enforcing the WPA is so deeply rooted that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the state of the power to act. *Henry v. Laborers Local 1191,* 493 Mich 934, 935 (2013). As discussed below, neither the LMRDA nor NLRA preempt Plaintiffs' WPA claims.

ARGUMENT

I. THE LMRDA DOES NOT PREEMEPT THE WPA.

Standard of review

The question of federal preemption is one of law, and therefore is one for the court. *City of Detroit v. Ambassador Bridge Co.,* 481 Mich 29, 35 (2008). MCR 2.116(C) (4) permits a court to dismiss a case for lack of subject matter jurisdiction. Under MCR 2.116(C) (4), this Court determines whether the affidavits together with the pleadings, depositions, and documentary evidence demonstrate a lack of subject matter jurisdiction. *L & L Wine & Liquor Corp. v. Liquor Control Comm'n,* 274 Mich App 354, 356 (2007). This Court reviews the grant or denial of a motion for summary disposition *de novo. Groncki v. Detroit Edison Co,* 453 Mich 644, 64 (1996). Further, the existence of subject-matter jurisdiction and a determination of preemption, which involves statutory interpretation, are likewise reviewed *de novo. Thomas v. United Parcel Service,* 241 Mich App 171 (2000).

A. The Purpose of the WPA and LMRDA.

1. The Purpose of the WPA.

Michigan's Whistleblower Protection Act WPA provides, in pertinent part:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to the law of this state, a political subdivision of this state, or the United States to a public body...

MCL 15.362. The statute was enacted in 1980 to "provide protection to employees who report a violation or suspected violation of state, local or federal law...." Preamble 1980 PA 469. (851a-852a.) When enacting the WPA, the Michigan legislature recognized that employees are in a unique position to discover corruption otherwise concealed by their employers, and, that without statutory protections, employees would be reluctant to report their suspicions for fear of losing their jobs or some other form of retaliation. See, e.g. *Ernsting v. Ave Maria College,* 274 Mich App506, 514[12] (2007), *app. denied* 480 Mich 985 (2007)*; Dudewicz v. Norris-Schmid, Inc.,* 443 Mich 68, 75 (1993), *overruled in part on other grounds by Brown v. Mayor of Detroit,* 478 Mich 589 (2007). This civil rights statue provides for personal liability, statutory attorney fees, compensation for economic and non-economic damages as well as equitable relief. MCL 15.361(b), (c); MCL 15.363 (3); MCL 15.364.

As this Court recently explained in *Whitman, supra* at *11:

> The WPA furthers this objective by removing barriers that may interfere with employee efforts to report those violations or suspected violations, thus establishing a cause of action for an employee who has suffered an adverse employment action for reporting or being about to report a violation or suspected violation of law. (citing *Dolan v. Continental Airlines/Continental Express,* 454 Mich 373, 378-379 (1997).)

Here, Defendants violated the WPA when they fired Plaintiffs because they "blew the whistle" about Aarons suspected criminal activity to the DOL.

2. The Purpose of the LMRDA.

The LMRDA "was the product of congressional concern of abuses of power by union

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[12] Federal law enforcement agencies, like the DOL, are considered public bodies for the purposes of the WPA. MCL 15.361(d) (v). See *Ernsting v. Ave Maria College,* 274 Mich App 506, 514 (2007), *app. denied* 480 Mich 985 (2007); *Robinson v. Radian, Inc. of Va.,* 624 FSupp 2d 617 (ED MI 2008).

leadership" and provided certain protections to union members. *Finnegan v. Leu,* 456 US 431, 435 (1982)[13]; *Bloom v. General Truck Drivers,* 783 F2d 1356, 1361 (9th Cir 1986). "In providing such protections, Congress sought to further the basic objective of the LMRDA: 'ensuring that unions [are] democratically governed and responsive to the will of their memberships.'" *Finnegan* held that these protections–i.e. the right of free speech, assembly, etc. identified in 29 USC § 411, also known as the union member's "Bill of Rights" contained in Title I of the Act, applied only to rank-and-file union members and *not* union officers or employees. *Finnegan,* 456 US at 437.

B. Preemption Analysis.

Congress has the power to preempt state law. *US Const, art 6, cl 2.* However, Michigan courts generally presume that it does not, *Duprey v. Huron & Eastern R Co, Inc,* 237 Mich App 662, 665 (1999), and that presumption can be overcome only where Congress clearly and unequivocally intends to do so. *Wayne Co Bd of Comm'rs v. Wayne Co Airport Authority,* 253 Mich App 144, 198. Preemption may be "express," where Congress has explicitly stated its intent to preempt state law; "field," where state law regulates conduct in a field that Congress has intended to occupy exclusively; or "conflict," where state law is in actual conflict with federal

[13] In *Finnegan,* Leu defeated the incumbent in a union presidential election. Leu proceeded to terminate business agents who campaigned against him. The Supreme Court held that the LMRDA permitted the union president under those circumstances to appoint agents of his choice to carry out his policies because it furthered the democratic process. 456 US at 441-442. *Finnegan* had absolutely nothing to do with reports of suspected illegal activity to law enforcement, or any other claims remotely similar to those alleged by Plaintiff-Appellees. See, *Cehalich v. UAW,* 710 F2d 234 (6th Cir 1983) (a member and employee of a union who was fired because he opposed a tentative labor agreement negotiated by union leadership could not avail himself of any membership protections contained in the LMRDA because his membership status was not impacted, and under *Finnegan,* the union leadership acted within its rights when it fired him for his political opposition to the tentative labor agreement) and *Vought v. Wisconsin Teamsters Joint Council, No. 39,* 558 F3d 617, 622-623 (7th Cir 2009) (business agents' termination by their political opponent was not "anti-democratic" and thus they had no protection under the LMRDA.)

law. *Grand Trunk Western Railroad Co v. City of Fenton,* 439 Mich 240, 243-24 (1992). The LMRDA does not contain express preemption provision for state law claims. *Chamber of Commerce of the United States v. Brown,* 554 US 60, 65 (2008); *Brown v. Hotel & Restaurant Employees and Bartenders,* 468 US 491, 505-506 (1984); 29 USC § 523(a) (LMRDA has no express preemption provision.)

Field preemption requires federal law to occupy a field so thoroughly that it is inferable that Congress did not intend to permit states to supplement it. *Cipollone v. Liggett Group, Inc,* 505 US 504, 516 (1992). The LMRDA does not occupy the entire field of regulation with respect to union employees because it contains a savings clause that provides that "except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or the law of any State." *O'Hara v. Teamsters Union Local No. 856,* 151 F3d 1152, 1161 (9th Cir 1998) (citing 29 USC § 523). Also See, 29 USC § 524.

Conflict preemption occurs "where it is impossible for a private party to comply with both state and federal requirements," or where the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English v. General Electric Co,* 496 US 72, 79 (1990) (citation omitted). Whistleblower protection for employees who expose corruption by union leadership is a complement to, and not in conflict with, the democratic purposes of the LMRDA. See *Smith, supra,* 109 Cal App 4th at 1649-1650.

C. LMRDA Preemption Analysis Applied to Plaintiffs' WPA Claims.

1. *Finnegan, Packowski* and other authority support state court jurisdiction over Plaintiffs' WPA claims.

Defendants cite *Finnegan v. Leu, supra,* in support of its argument for LMRDA preemption. *Finnegan* held *only* that the elected leadership may terminate policy-making or policy-implementing employees at will to reflect the democratic mandate of the membership. 456 US at 436-437. Neither the LMRDA nor *Finnegan,* however, gives union officials unlimited discretion in employment matters. Specifically, they may not deprive union employees of public policy and statutory state law claims designed to protect employees from retaliation. See, e.g. *Smith v. Int'l Brotherhood of Electrical Workers, Local Union 11,* 109 Cal App 4th 1637, 1649-50 (2003); *Bloom, supra,* 783 F2d at 1361; *Ardingo v. Local 951 and United Food Commer. Workers Union,* 333 Fed Appx 929, 936 (6th Cir 2009, unpublished, **Ex. C);** *Montoya v. Local Union 111 of Int'l Brotherhood of Electrical Workers,* 755 P2d 1221, 1224 (Colo App 1988); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n.,* 505 US 88, 98 (1992); *Hines v. Davidowitz,* 312 US 52, 67 (1941).

Defendants rely heavily on the majority opinion of *Packowski v. United Food and Commercial Workers, supra,* in which the Michigan Court of Appeals found that conflict preemption, barred a discharged union employee from bringing a state law breach of contract claim against his union employer. 289 Mich App at 149. The *Packowski* majority unequivocally stated that its decision was limited to the issue of whether or not the union employee was fired in violation of his employer's just-cause policy. *Id.* at 134, 136. *Packowski* has no application here.

Without acknowledging this limitation, Defendants ask this Court to expand the narrow holding and apply it to an issue *Packowski* never even considered: whether the LMRDA

preempts a union employee's WPA claim for reporting suspected illegal activity to law enforcement. As reasoned by the both courts below, *Packowski* offers Defendants no assistance.

Packowski involved a business agent who claimed that he was demoted and later discharged. He sued in state court to enforce his union-employer's just-cause employment policy. *Id.* at 134-135. The employer claimed that the employee was discharged because he failed to follow legitimate policies, such as itinerary and mileage recording. *Id.* The trial court found that the LMRDA preempted the employee's common law breach of contract claim.

On appeal, the *Packowski* majority cited *Screen Extras Guild, Inc. v. Superior Court,* 800 P2d 873, 876-79 (Cal 1990); *Finnegan, supra; Vitullo v. Int'l Brotherhood of Electrical Workers,* 75 P3d 1250 (2003); *Tyra v. Kearney,* 153 Cal App 3d 921, 923-926 (1984); *Smith v. Int'l Brotherhood of Electrical Workers, Local Union 11, supra*; and *Dzwonar v. McDevitt,* 791 A2d 1020, 1022 (NJ 2002), *aff'd on other grounds,* 828 A2d 893 (NJ 2003), to find that the employee's common law breach of contract claim conflicted with the purposes of the LMRDA and thus, was preempted. 289 Mich App at 148-149[14].

In an opinion authored by Judge Wilder, the *Packowski* majority reasoned that: "[T]he democratic purposes of the LMRDA would be contravened by allowing a demoted or discharged business agent or organizer to sue for wrongful discharge." *Id.* at 144. The same is not true, however, for an employee discharged for reporting union corruption to authorities. The

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[14] The *Packowski* majority, 489 Mich App at 147-148, found unpersuasive the unpublished Sixth Circuit case of *Ardingo v. Local 951, United Food and Commercial Workers Union,* 333 Fed App 929 (6th Cir 2009). *Ardingo* held that a business agent's state law claim to enforce a just-cause contract with his union did not conflict with the purposes of the LMRDA, *Id.* at 934. The *Ardingo* court reasoned that since the union was authorized to enter into just-cause employment contracts with its employees, there was no justification for preemption of the employee's state law breach of contract claim. *Id.*

democratic objectives of the LMRDA do not conflict with WPA or public policy claims which implicate criminal violations of federal and state laws by union leadership. See *Smith, supra* at 104 Cal App 4th at 1649-50; *Bloom, supra*, 783 F2d at 1360, and *Dzwonar, supra*, 791 A2d at 1026.

The cases relied upon by the *Packowski* majority, except for *Dzwonar* and *Smith*, involved "garden variety" wrongful discharge claims, or "patronage" discharges. *Screen Extras, supra,* involved a business agent who sued for a common-law claim of good faith and fair dealing after being fired for dishonesty and insubordination. *Vitullo*, *supra*, and *Tyra, supra,* involved union employees who, respectively, lost elections and were subsequently fired by their victorious political rivals. The *Screen Extras, Vitullo*, and *Tyra* courts found federal preemption of the employees' state law "just cause" claims because the firings were within the prerogative of the elected business manager and consistent with the democratic purposes of the LMRDA. *Screen Extras,* 800 P2d at 800; *Vitullo,* 752 P3d at 1252-1255; *Tyra,* 154 Cal App 3d at 921-923.

Plaintiffs' WPA claims are of a far different nature than the common law "just-cause" or patronage firings discussed above. Plaintiffs' were fired because they contacted the DOL to report their belief that their boss was involved in a kickback scheme and misusing union funds –a violation of federal and state criminal laws. The WPA expressly prohibits any discriminatory or retaliatory conduct against an employee who reports suspected violations of state or federal laws to a law enforcement agency. MCL 15.362. For good reason, these claims are not preempted by the LMRDA. See, e.g. *Smith, supra,* 109 Cal App 4th at 1649-1650.

In *Smith, supra*, an employee sued his union employer and its business manager for wrongful discharge in breach of contract, violation of public policy against age discrimination, and disability discrimination codified by California's Fair Employment and Housing Act, CA Code § 12900, *et. seq.* While the *Smith* court found that the LMRDA preempted the employee's common law breach of contract claim, it held that the employee's statutory claims were not preempted.

The *Smith* court explained:

> The *Screen Extras* opinion left two questions unanswered. Does the class of claims preempted by the LMRDA include those brought by *non*policymaking employees? **Does the preempted class of claims include claims of employment discrimination based on sex, race, age, disability, religion and the like?**
>
> For the reasons explained below, we need not address the first question because the undisputed evidence shows Smith was a member of the union's policymaking staff. **As to the second question, the short answer is: not in *this* century; not in *this* court.** [Italics in original; bold added.]
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> * * * * *
>
> Adopting the union's view of LMRDA preemption would have ramifications far beyond upholding "the ability of an elected union president to select his own administrators."

CONSIDER:

> One of the seminal California cases establishing the tort of wrongful termination in violation of public policy was brought by Peter Petermann, a union business agent, who was fired for disobeying his supervisor's instruction to lie in the testimony he gave before a California legislative committee. Reversing judgment for the union complaint for wrongful discharge our Supreme Court stated: "To hold that one's continued employment could be made contingent upon his commission of a felonious act at the insistence of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare." **It would be ironic indeed if a law enacted to "curb abuses of power by union leadership" was used instead to protect such abuses. In the same vein, employees could be discharged without recourse for blowing the whistle on bribery, kickbacks and tax evasion. If the LMRDA preempts a union employee's cause of action for wrongful discharge in violation of public**

policy, the deterrent effect of such suit is lost "and nothing prevents unscrupulous employers from forcing employees to choose between committing crimes and losing their jobs." (Citing *Bloom, supra* at 1361.) 109 Cal App 4th at 1649-50.[15] (Bold added)

Similarly, in *Dzwonar, supra,* a case cited by the *Packowski* majority and given great weight by Defendants, a New Jersey appellate court found that an employee's claim under the Conscientious Employee Protection Act (CEPA) was preempted by the LMRDA. The *Dzwonar* plaintiff was employed by the defendant union as an arbitration officer who was fired by the union's president. She complained that the union failed to read its minutes to the general membership in violation of the union's internal policies. The plaintiff's CEPA claim "...did not contend that any of the actions were violations of law in themselves. Instead, she asserted that the Executive Board violated the law by failing to inform and obtain approval from the general membership on those actions based on internal procedures contained in the union's bylaws." *Dzwonar*, 791 A2d at 1022.

The *Dzwonar* court recognized that CEPA was designed to give "broad protections against employer retaliation" for employees acting in the public interest. *Id.* "***Nonetheless, we believe this CEPA claim is preempted by the LMRDA because it is based solely on an alleged LMRDA violation implicating neither federal nor state criminal law.***" (Italics/Bold added). The *Dzwonar* court reasoned:

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[15] See, *Montoya v. Local Union III,* 755 P2d 1221, 1223-24 (Colo App 1988) (terminated employee's breach of contract claim preempted by the LMRDA but public policy claim based on refusal to conceal violation of criminal statute or aid in such violation was not preempted because it advances the interests of the LMRDA and any impact on the federal statute is merely peripheral.) Also See, *Hawaiian Airlines Inc. v. Norris*, 512 US 246, 266 (1994) (Railway Labor Act did not preempt plaintiff's claims for violation of Hawaii's Whistleblower Protection Act.)

> Preemption of state law in this context is governed by the LMRDA, which admittedly contains no express limitation of the right of states to protect union employees from discharge in retaliation for conduct falling within a law such as the CEPA. Nevertheless, we believe such a limitation may be inferred from the federal acts scope, **at least where the purported violation of law does not involve criminal conduct.** (Bold added).

Id. at 1024. Because "this case involves, at most, the federal regulatory scheme and the Union's own internal operating policies" the CEPA claim was preempted.[16] *Id.*

Importantly, the Court of Appeals noted this crucial language in *Dzwonar's* reasoning. Defendants, however, completely omit and ignore this clear caveat in the hope that this Court will follow suit. ***Obviously, the Dzwonar court would not have preempted the plaintiff employee's state law retaliation CEPA claim had she implicated a violation of federal or state criminal laws, as Plaintiffs do in our case.*** See, e.g., 29 USC § 501(c) and MCL 750.174; *Packowski, supra*, at 143-144. After a full and fair reading, both lower courts found that *Dzwonar* was readily distinguishable and did not preempt Plaintiffs' WPA claims.

Smith, Montoya, Bloom and *Dzwonar* establish that the LMRDA does not preempt Plaintiffs' WPA claims just as the LMRDA does not preempt Michael Ramsey's public policy claim in the *Ramsey/Dowdy* case. As explained in *Smith,* whistleblowers, like Plaintiffs, who expose corruption, kickbacks, embezzlement and other criminal activity by union leaders, compliment and advance the democratic and corruption deterrent objectives at the heart of the

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[16] On appeal, the New Jersey Supreme Court stated: "Because Plaintiff has failed to establish a CEPA claim, we need not comment on the Appellate Division's holding that federal labor law preempts a state law claim for common law or statutory wrongful discharge when the claim implicates a union's internal policies and fails to allege that criminal conduct has occurred." *Dzwonar v. McDevitt,* 828 A2d 893, at 904 (2003). Here, Plaintiffs alleged that Aaron was engaged in criminal conduct.

LMRDA. It would be illogical and contrary to the *raison d'être* of the LMRDA to permit an employee to pursue a public policy claim against his union employer based on the employee's refusal to commit a crime but deny that employee's state law WPA claim that he was fired because he reported the crime to law enforcement. The very purpose underlying the public policy exception to LMRDA preemption applies with equal force to Plaintiffs' WPA claim. **"It would be ironic indeed if a law enacted to curb 'abuses of power by union leadership' was used instead to protect such abuses."** *Smith* at 1650. (Bold added). This "irony" is exactly what Defendants suggest this Court embrace.

In addition, the evidence, pleadings and discovery responses establish that Henry and White's discharge had nothing to do with patronage, political opposition or breach of contract, as was the case in *Finnegan, Screen Extras, Vitullo* and *Tyra.* The November 11, 2009 letters of "indefinite layoff" (i.e., termination) given to Plaintiffs within six days of the May 5, 2009 publication of attorney Legghio's "findings and recommendations", attributed their discharge solely to "the Local's finances and the projected work hours...." (445a, 447a.)

Moreover, Defendants never asserted the affirmative defense of patronage discharge as to Plaintiffs required by MCR 2.111(F) (3)[17]. (40a.) The undisputed fact that Aaron (with benefit of seasoned labor counsel) never dated, delivered or utilized pre-signed letters of resignation, is

[17] Failure to timely raise an affirmative defense results in waiver of the defense. See, *Walters v. Nadell,* 481 Mich 377, 389 (2008).

compelling proof that Plaintiffs' firings had nothing to do with patronage, politics or the democratic process but everything to do with their WPA protected activity. (131a, 132a.)

The WPA and LMRDA have a common purpose—to expose and root out corruption. Plaintiffs' WPA claims do not conflict with the LMRDA. There is no preemption. This Court, therefore, should deny Defendants' Appeal and affirm the rulings of the trial court and Court of Appeals.

2. The State Has a Strong Interest in Protecting Employees Who Report Suspected Illegal Activity by Their Employer to Law Enforcement.

The *Packowski* court, *supra* at 145-148, also discussed *Bloom v. General Truck Drivers,* 783 F2d 1356, 1360 (9th Cir 1986), to distinguish breach of contract claims preempted by the LMRDA from public policy claims not subject to preemption because of the state's strong interest in allowing such claims to proceed in state court. *Bloom* involved a business agent who claimed he was "...fired for refusing to alter the minutes of a union meeting to cover up an unapproved expenditure (in effect an embezzlement) of union funds by other officers" in violation of the California penal code. *Id.,* 783 F2d at 1360-1361. "Preemption questions clearly require us to balance state and federal interests, although the relative importance attached to each interest is unclear." *Id.* at 1360.

The *Bloom* Court added:

> In the present case, Bloom argues that he was fired, not for political reasons, or for no reason at all, but rather because he refused to illegally alter the minutes of a union meeting. Not only is the state's interest in allowing the wrongful discharge charge action here strong, as discussed above, but the federal interest is much lessened under these circumstances. The kind of discharge alleged, retaliation for refusal to commit a crime and breach a trust, is not the kind sanctioned by the Act, or by the Courts in *Finnegan* or

> *Tyra.* ***Protecting such a discharge by preempting a state cause of action based on it does nothing to serve union democracy or the rights of union members; it serves only to encourage and conceal such criminal acts.***

Bloom, 783 F2d at 1362 (Italics/Bold added).

Like the union employee in *Bloom,* Plaintiffs do not claim that they were fired for political reasons or no reasons at all. Instead, Plaintiffs allege they were fired because they reported their employers' suspected criminal activity to law enforcement. Like in *Bloom*, the state's public policy interest in enforcing the protections of the WPA and allowing union employees to litigate such a claim in state court is "strong."

Michigan public policy prohibits discharge of an employee because he refused to commit a crime and forbids "...the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." *Suchodolski v. Mich. Consolidated Gas Co.,* 412 Mich 692, 694-695 fn. 2 (1982). The WPA is a codification of Michigan public policy. *Id.* It forbids employers from retaliating against whistleblowers because the public interest in exposing illegal conduct by an employer is substantial and beneficial to the State.

Without whistleblower protection for union employees, like Plaintiffs, corruption by union leadership may very well remain concealed and undetected. It is equally undeniable that the WPA advances the democratic purposes of the LMRDA by exposing suspected criminal activity by union leadership. Consequently, any impact of allowing Plaintiffs' WPA claims to proceed in state court is "merely peripheral to the concerns of the Act" and not an obstacle to the accomplishment of the objectives of the statute. *Bloom, supra* at 1362 (citations omitted). Under

the balancing test explicated in *Bloom,* the LMRDA does not preempt Plaintiffs' WPA claims. The trial court, therefore, correctly ruled that it had subject matter jurisdiction.

3. Section 412 of LMRDA Has No Application to Plaintiffs' WPA Claims.

In a footnote, the *Packowski* majority wrote:

> We note that, to the extent that plaintiff has a claim of being demoted or fired in retaliation for participating in a Department of Labor investigation [into defendant's election activities], he has an action for such claim in a federal court. **29 USC § 412 provides for a civil action in federal court if there is retaliation based on giving truthful testimony to the Department of Labor.[18] (Bold added.)**

289 Mich App at 146 n. 3. Plaintiffs never testified to the DOL. Nevertheless, Defendants latch on to this footnote, which at best is nothing more than *obiter dicta*, to argue that 29 USC § 412[19] provided Plaintiffs an exclusive federal cause of action for retaliation based on their reports to the DOL of Defendants suspected crimes. The *Finnegan* Court held that § 412 applies *only* to union members who believe their membership rights were infringed upon[20]. Section 412 has no

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[18]The bolded portion of this passage was omitted by Defendants in their Briefs filed in the lower courts and this Court. This is an example of Defendants' practice of ignoring or intentionally omitting material language which undermines their argument.

[19] "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

[20] Under *Finnegan, supra* at 436-437 n. 7, Plaintiffs cannot avail themselves of § 412 because Plaintiffs do not claim that their status as union members were affected or infringed upon. A union *employee* who is discharged in a way that does not affect his rights as a union *member* has no cause of action under § 412.

application here because Plaintiffs filed this action in their capacity as employees and never claimed that their membership rights were imperiled or diminished.

The Panel below noted both *Finnegan* and Judge Beckering's dissent in *Packowski* to find that § 412 did not apply:

> As noted by the dissenting opinion in *Packowski*, "in general the LMRDA protects the rights afforded union *members* because of their status as members, not the rights afforded appointed union *employees* because of their status as employees." *Packowski, 289 Mich App at 152 n 1* (Beckering, P.J., dissenting), citing *Finnegan, 456 U.S. at 436-437* (emphasis in original). In *Bloom*, the plaintiff's claim was actually based on his firing as a business agent, which was not intended to be prohibited by the LMRDA. *Bloom, 783 F2d at 1359*, citing *Finnegan, 456 U.S. at 436-437*. Without an infringement on the plaintiff's rights as a union member, the plaintiff had no cause of action under *§ 411* and *§ 412. Bloom, 783 F2d at 1359*. ***Here, plaintiffs brought their claims as employees and have not alleged any infringement on their membership rights, so they have no cause of action under § 412.*** See *Bloom, 783 F2d at 1359.*

Henry, supra at *9-*10 (footnote omitted) (Italics/Bold added.) The Court, including Judge Wilder, the author of the majority opinion in *Packowski,* made clear that *Packowski* is not nearly as expansive as Defendants insist.

Defendants also argue that *Ardingo v. Potter,* 445 F Supp 2d 792 (WD MI 2006) supports preemption. *Ardingo* involved a business agent who refused to contribute $5,000.00 to a defense fund established to reimburse union officers being investigated by the DOL, including the union's president. The *Ardingo* plaintiff also announced that he was running for vice-president of the union in the upcoming election. After his announcement, the *Ardingo* plaintiff alleged that his union's president "proclaimed" that plaintiff was a traitor; that he was assisting those opposed to the re-election of the union president; that he was assisting the DOL in an unwarranted and spurious investigation, and; that he would be fired after the election. *Id.* at 794.

Sometime *after* the president's proclamation, Plaintiff cooperated with the DOL and testified before the grand jury concerning financial improprieties by the president. After his termination, the *Ardingo* plaintiff filed suit claiming: (1) that the union and its president had violated his freedom of speech to comment on union affairs in contravention of § 411(a)(2) and (a)(5); (2) that defendants unlawfully disciplined him for failing to make special assessment payments under the LMRDA; (3) that defendants violated Michigan public policy by terminating him for exercising his free speech rights guaranteed him under LMRDA, and; (4) that defendants wrongfully terminated him in violation of his employer's just-cause policy. *Id.* at 794-795.

In granting in part and denying in part the union's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the *Ardingo* court dismissed the employee's public policy claim. *Id.* at 798. The court reasoned:

> Plaintiff's theory of wrongful discharge against Michigan public policy is that he was discharged for exercising his free speech rights under the LMRDA. However, "[a]s a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative." *Dudewicz v. Norris-Schmid, Inc.*, 443 Mich 68, 75, 86, 503 (1993). The Court is unaware of any common law right to be free from reprisal when commenting on matters concerning a labor organization. Therefore, the Court finds that the LMRDA provides Plaintiff's exclusive remedy for any retaliation generated by his free speech. Consequently, summary judgment is appropriate on his wrongful discharge against Michigan public policy claim.

Id. at 798-799. (Footnoted omitted).

As noted by the Panel below, *Ardingo* offers Defendants no safe harbor:

> Defendants also cite *Ardingo v Potter, 445 F Supp 2d 792 (W D Mich, 2006)*, for support of their argument that the LMRDA provides plaintiffs' exclusive remedy. However, in *Ardingo*, the plaintiff's wrongful discharge claim was based on exercising his free speech rights under the LMRDA. *Ardingo, 445 F Supp 2d at 798.*

Henry, supra, at *3 n. 2. The Court of Appeals, therefore, properly rejected Defendants' efforts to miscast Plaintiffs' classic WPA case as a "free speech" claim intended to protect union members, not union employees[21]. *Id.* at *10.

Defendants' assertion that Plaintiffs' WPA claims "thoroughly implicates the LMRDA scheme" is false. Plaintiffs' WPA claims are premised on state law which forbids their terminations because they reported suspected criminal activity to law enforcement. The only relevance that the LMRDA has in this case is that § 501(c) makes it a crime to steal union funds.

MCL 15.362 expressly provides that an employee is protected from discharge when he reports a suspected violation of federal law (i.e. 29 USC § 501(c)) to law enforcement. MCL 15.361(d) (v). Plaintiffs engaged in protected activity under the WPA, and Defendants knowingly violated the law when they fired the Plaintiffs for doing so. Moreover, Plaintiffs reports to the DOL implicate other state and federal criminal laws, such as embezzlement and tax evasion. The LMRDA, therefore, does not deprive the trial court of subject matter jurisdiction over Plaintiffs' WPA claims.

II. THE NLRA DOES NOT PREEMPT PLAINTIFFS' WPA CLAIMS.

A. The NLRA and *Garmon* Preemption.

1. The NLRA.

Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers,

[21] *Ardingo* did not involve a WPA claim.

businesses and the U.S. economy. See, 29 USC § 151. The primary purpose of the Act is to "safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining . . . without restraint or coercion by their employer." *NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1, 33, 57 (1937); 29 USC §§ 151, 158. "The ultimate objective of the National Labor Relations Act, as the Supreme Court has explicitly stated, is 'industrial peace.'" *Id. at 10* (citing *Auciello Iron Works, Inc. v. NLRB,* 517 US 781, 785 (1996)). The NLRA, however, does not undertake to protect union members in their rights as members from arbitrary conduct by unions and union officials. *International Association of Machinists v. Gonzales*, 356 US 617, 620 (1958).

Under *§7* of the NLRA, employees possess "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and have the right to refrain from such activities. 29 USC § 157. The NLRB is empowered "to prevent any person from engaging in any unfair labor practice." *Id.*at § 160(a). *§ 8* of the NLRA makes it is an unlawful labor practice for employers "to interfere with, restrain, or coerce employees" in their exercise of *§ 7* rights. 29 USC § 158(a) (1).

2. *Garmon* Preemption.

The NLRA does not contain an express preemption provision. *Metro Life Ins v. Massachusetts,* 471 US 724, 747 (1985). Nor does it reveal "a congressional intent to usurp the entire field" of labor relations. *Brown v. Hotel and Rest Emps & Bartenders Int'l Union Local 54,* 468 US 491 (1984). In effect, however, the NLRA has "largely displaced" regulation of

industrial relations by the states. *Wis. Dept. of Indus. Labor & Human Relations v. Gould,* 475 US 282, 286 (1986). From this principle emerged the general rule of preemption set forth in *San Diego Bldg. Trades Council v. Garmon*[22], 359 US 236 (1959).

In *Garmon,* the Supreme Court held that "when an activity is arguably[23] subject to *§ 7* or *§ 8* of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245. *Garmon*, however, carved out exceptions to preemption which provide that a state regulation or cause of action will not be preempted if the behavior to be regulated is behavior that is only of peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. *Id.* at 243-244; *Sears, Roebuck & Co v. San Diego County Dist. Council of Carpenters,* 436 US 180, 188 (1978). Accordingly,

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[22] In *Garmon,* the NLRB declined to exercise jurisdiction over a case where a labor union picketed before being certified as the bargaining agent for the employees. The California Superior Court exercised jurisdiction and eventually the state court awarded damages to the employer based on state tort and labor relations law. On appeal, the United States Supreme Court reversed the damages award and issued what is now known as the "*Garmon* preemption doctrine". Namely, when conduct is "arguably subject to *§ 7* or *§ 8* of the Act," federal law preempts state regulation on the subject. Because the conduct at issue in the case (strike action) was arguably covered by *§ 7* of the Act, the Supreme Court reversed the state damages award.

Clearly, the conduct that was being regulated in *Garmon*–picketing in support of a labor organization–is radically different from the conduct at issue in the instant case. Here, the focus must be upon what the Defendants did as *individual employers*, not as a labor organization. Defendants terminated Plaintiffs because they reported suspected illegal activity to the law enforcement, not because they supported or objected to the union.

[23] The party claiming preemption is required to demonstrate that the party's case is one that the NLRB could legally decide in the employees favor. See Ann K. Wooster, *Annotation, Construction and Application of the Garmon Preemption Doctrine by Federal Courts,* 2003 ALR Fed 1 § 6 (2003); See also, *Williams v. Watkins Motor Lines, Inc,* 310 F3d 1070, 1072 (8th Cir 2002) and *Int'l Longshoremen's Ass'n v. Davis*, 476 US 380, 396 (1986) (explaining that the party asserting preemption bears the burden of showing the challenged activity is arguably prohibited by the NLRA.)

Garmon preemption is not absolute or rigidly applied in "mechanical fashion"[24]. *Farmer v. United Bhd. Of Carpenters & Joiners,* 430 US 290, 296-297, 302 (1977); *Chaulk Services, Inc v. Massachusetts Comm'n Against Discrimination,* 70 F3d 1361, 1371 (1st Cir 1995).

In *Sears, Roebuck & Co v. San Diego County Dist Council of Carpenters,* 436 US at 188-189, 197, 202 (1978), the Supreme Court stated the following with regard to the issue of NLRA preemption of a state cause for trespass which involved picketing workers:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid. (fn. omitted.)
>
> ***
>
> The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board.

Id. at 197. Consequently, there is no preemption unless the controversy before the state court is *identical* to the dispute that could have been presented to the NLRB. *Id.* Because the state court's adjudication of the state claim created "no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practice," there was no *Garmon* preemption. *Id.* at 198. Plaintiffs' retaliatory discharge for their reports of suspected illegal activity to the DOL was not, and could not have been, presented to the NLRB.

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[24] The Supreme Court has squarely held that *Garmon* preemption does not turn on whether a claim arises in the context of a labor dispute. *Linn v. United Plant Guard Workers of America, Local 114,* 383 US 53, 63 (1966). ("Nor should the fact that defamation arises out of a labor dispute give the Board exclusive jurisdiction to remedy its consequences.")

B. The NLRA Does Not Preempt Plaintiffs' WPA Claims Because the TULC Volunteers Are Not "Employees" Covered by the Act.

Preemption turns on the nature of the conduct in question, not on the way it is pleaded. *Zavadil v. Alcoa Extrusions, Inc,* 437 FSupp 1068 (DC SD 2006), citing *Platt v. Jack Cooper Transport, Co, Inc,* 959 F2d 91, 94 (8th Cir 1992). The DOL Investigative Report, the November 5, 2009 Legghio letter, and trial court pleadings all establish that Plaintiffs' claimed they were fired because they reported Aaron's suspected criminal activity to law enforcement. The fact that the TULC volunteers lacked proper clothing, safety equipment or failed to receive proper wages was not what prompted Plaintiffs to contact the DOL. Only after Plaintiffs discovered that Aaron had instructed a reluctant Ruedisueli to issue checks from the Union's treasury to the TULC volunteers and falsely attributed payment to a phantom "picket line" duty did Plaintiffs conclude that Aaron was receiving cash kickbacks for providing essentially free labor to the TULC[25]. This alleged kickback scheme is what was reported to--and investigated by--the DOL

Finding the actual facts inconvenient, Defendants scrub virtually all allegations of Plaintiffs' reports of "corruption" or "kickbacks" from their Brief. In spite of this transparent tactic, Defendants cannot sustain their burden of showing that the challenged activity is arguably protected or prohibited by the NLRA. *Int'l Longshoremen's Ass'n v. Davis,* 476 US 380, 396 (1986.); *Northwestern Ohio Adm'rs, Inc v. Walcher & Fox, Inc,* 270 F3d 1018, 1027 (6th Cir 2001).

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[25] The DOL Investigation Report confirms that members who volunteered for the TULC project initially believed that they were contacted for training and not physical labor. This explains why the workers were not properly dressed for demolition work. (294a-295a.) As previously noted, the "training" initially expected by the unemployed union members who volunteered at the TULC, is not mentioned in the Legghio "investigation" letter. (440a-441a.)

Defendants correctly note that "activity is 'concerted' if it relates to group action for the mutual aid and protection of *other employees*." (Italics added.) (Defendants Brief on Appeal, pp. 21-22.) Defendants argue that Plaintiffs engaged in "concerted activity" for purposes of *§ 7* of the Act when they told the DOL about "...their fellow members' working conditions and wages. Plaintiffs complaints allege that they acted in concert for the purpose of furthering such group wage and working condition goals[26]." (Defendants Brief on Appeal, p. 24.) Even if this Court were to adopt Defendants' mischaracterization of the true nature of this action, Defendants argument fails because it rests on the erroneous premise that "volunteers" are "employees" under the NLRA[27]. They are not.

The Supreme Court in *NLRB v. Town & Country Electric, Inc,* 516 US 85, 89 (1995), held that the rights guaranteed in *§ 7* and *§ 8* of the Act only apply to "employees," not volunteers. Section § 152(3) of the Act states, in pertinent part:

> *"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise*, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended

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[26] The *First Amended Complaint* alleges that Plaintiffs were fired in retaliation for reporting suspicions of "fraud and illegal activity" to law enforcement. (27a-29a.) The *First Amended Complaint* makes no reference to "concerted activity", "mutual aid and protection", or any other such language and this had nothing to do with their discharge.

[27] In *Int'l Longshoremen Ass'n v. Davis,* 476 US at 394-395, the Supreme Court spoke to a union's burden in arguing preemption: "If the word 'arguably' is to mean anything, it must mean that the party claiming preemption is required to demonstrate that his case is one the Board could legally decide in his favor."

> from time to time, or by any other person who is not an employer as herein defined." 29 U.S.C. § 152(3) (italics added).

"*This definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own.*" *Eastex v. NLRB,* 437 US 556, 564 (1978) (Italics added). Accordingly, *§§7* and *8(a)* are relevant only if an employee is engaged in concerted activity for the benefit of another employee or an employee of another employer. *Id.* As Defendants admit, that is not the case here.

In *WBAI Pacifica Foundation and United Electrical Radio and Machine Workers,* 328 NLRB No. 179 (1999), the NLRB looked to *Town & Country* to hold that unpaid staff who volunteered their time to a non-profit radio station were not "employees" for purposes of the NLRA even though staff members received reimbursements for expenses. Defendants' argument that Plaintiffs engaged in "concerted activity" for the TULC volunteers fails because the volunteers are not "employees" as defined by §152(3) required for protection under *§ 7* and for Defendants conduct to constitute an unfair labor practice for presentation to the NLRB.

Here, Defendants admit that union members who worked on the TULC were unemployed volunteers who gratuitously donated their time. As for the "modest stipend", Defendants' attorney wrote:

> *Stated another away, the modest stipend paid to these Local 1191 members who volunteered their time and work is nothing more than [sic] the Local's effort to modestly reimburse unemployed Local 1191 members for their expenses when they voluntarily donated their work to this cause.* (441a.)

The unemployed union volunteers who worked on the TULC were not covered by the NLRA. Under *Eastex,* and the express language of *§ 7*, therefore, Plaintiffs had no cognizable

claim to present to the NLRB, let alone one identical to their WPA claim. The TULC volunteers were induced to show up by false representations (i.e., members believed they were to receive "training") which caused them to perform private work and then their silence was purchased by a monetary payment all in an effort to cover up potential illegal activity. Further effort to conceal this reality included the false entries on the eight checks issued to these volunteers.

C. The NLRA Does Not Preempt Plaintiffs' WPA Claims Because the Act Does Not Prohibit an Employer From Retaliating Against an Employee Who Reports Suspected Illegal Activity to the Department of Labor.

Sears Roebuck emphasized that the "critical inquiry" for determining NLRA preemption "...is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented ...is identical to...or different from...that which could have been, but was not, presented to the Labor Board." 436 US at 197. The NLRA provides no protection for an employee who reports suspected illegal activity to the DOL. The NLRA only protects an employee who files a charge with the NLRB, testifies before the NLRB or assists in an NLRB investigation. 29 USC § 8 (a) (4)[28].

The unpublished federal district court case of *Flores v Midwest Waterblasting,* 1994 US Dist LEXIS 17704 (DC MI 1994), discussed at length by Defendants, is instructive. In *Flores,*

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[28]The NLRA has no analogue to the WPA and does not prohibit an employer from discharging an employee because he or she reported suspected criminal activity to law enforcement, including the DOL. *§ 8(a) (4)* of the NLRA only provides that "it shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act. 29 USC § 158(a) (4). Consequently, an employer may not discriminate against an employee for giving sworn statements to an NLRB field examiner, even though the employee had neither "filed charges" nor "given testimony" at a hearing, *NLRB v. Scrivener,* 405 US 117(1972), or for filing a claim with a state labor commission that his employer failed to pay him according to a collective bargaining agreement. *NLRB v. Searle Auto Glass, Inc.,* 762 F2d 769, 774 n. 6 (9th Cir 1985). In this case, no one filed a charge of any kind with the NLRB, testified at any hearing or interviewed with an NLRB agent. In addition, no collective bargaining agreement is at issue in spite of Defendants' misleading efforts to insinuate that one is.

plaintiff employees learned that the employer was not abiding by the terms of the collective bargaining agreement with respect to wages. Plaintiffs alleged that after they complained to the defendant employer about its failure to pay contractual wages, the employer retaliated by reducing their hours of work, threatening to fire them, and otherwise harassing them. The plaintiff employees subsequently filed reports with the NLRB. They filed suit against the employer, alleging, among other things, that the defendant employer violated the Michigan WPA by discriminating against them for making reports to the NLRB and other undisclosed public authorities.

The *Flores* court held the plaintiffs' WPA claim was preempted under *Garmon* because *§ 8(a) (4)* of the NLRA *specifically* protects employees who file charges or give testimony to the NLRB. The court, *supra* at *25-*26, wrote:

> Plaintiffs' Whistleblower's claim is preempted under *Garmon.* § 8(a) (4) of the [NLRA] provides that "[i]t shall be an unfair labor practice for an employee to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act. 29 USC § 158(a) (4).
>
> ****
>
> Here, Plaintiffs claim they were discriminated against because they made reports about Defendant employers' "misconduct" to the NLRB and other undisclosed public authorities. Such reports are protected activity under § 7 of the NLRA and an employer commit an unfair labor practice if it discriminates against the exercise of such protected activity. 29 USC § 158(a) (4). Therefore, the discrimination claimed of in Plaintiffs' Whistleblowers' claim is preempted under *Garmon.*

The court in *Flores* distinguished between making reports to the NLRB–conduct expressly protected under the NLRA–and making reports to outside agencies. So as to negate any remaining doubt about why they were preempting the WPA claims, the court added:

> **§ 8(a) (4) does not apply to filing charges or testifying under legislation other than the NLRA.** See *B & M Excavating,* 155 NLRB 1152 (1965), *enf'd* 368 F2d

624 (9th Cir 1966). **To the extent that Defendants discriminated against Plaintiffs for making reports to public bodies other than the NLRB concerning issues unrelated to the CBA and not arguably prohibited or protected by the NLRA, Plaintiffs Whistleblowers' claim would not be preempted**. Plaintiffs, however, did not specify any public bodies other than the NLRB. (Complaint, para. 74-76.) Therefore, Plaintiffs allegations fail to state a claim other than the NLRB claim discussed above.

Flores, supra at n. 4. (Bold added.) Under the analysis in *Flores,* the NLRA does not preempt Plaintiffs WPA claim because there was no cognizable issue which was, or could have been, presented to the NLRB. Plaintiffs reported suspected criminal activity to the Department of Labor.

Defendants further misplace reliance on *Calabrese v. Tendercare of Michigan of Michigan,* 262 Mich App 256 (2004), *Sitek v. Forest City Enterprises, Inc,* 587 FSupp 1381 (DC MI 1984) and other unpublished opinions. All of these cases involved plaintiffs who were retaliated against because they refused to discriminate against union employees or engage in union busting activity specifically prohibited by the NLRA[29]. *Calabrese* involved an employee who was fired because she refused to fire co-employees for engaging in unionizing activities and filed a complaint in state court for wrongful discharge in violation of public policy, tortious interference with business relations and intentional infliction of emotional distress. 262 Mich at 257-259. Citing the "critical inquiry" language in *Sears Roebuck,* the *Calabrese* court found plaintiffs state claim was preempted by the NLRA because firing an employee for refusing to

[29] All of the unpublished cases cited by Defendants are inapposite. These unpublished decisions involved plaintiffs who had either refused to discriminate against union members, engaged in unionizing activity, testified before the NLRB or engaged in other activity expressly protected under *§ 8(a) (1), (3)* and *(4).* In those cases, preemption was appropriate. In this case it is not. Nothing in the NLRA prohibited Defendants from retaliating against Plaintiffs (or protected Plaintiffs from retaliation) for their reports of suspected criminal activity to the DOL.

interfere with unionizing activity was an unfair labor practice pursuant to *§ 8 (a) (1)* and *(3)* and was an issue identical to that which could have presented to the NLRB. *Id.* at 261-262. In *Sitek,* the District Court found NLRA preemption because *§ 7(a)* specifically prohibited an employer from discharging an employee for refusing to engage in union busting and the issue was one identical to that which could have been filed with the NLRB on an unfair labor practice charge. 587 FSupp at 1384.

Calebrese, Sitek and other opinions cited by Defendants are easily distinguishable and support state court jurisdiction. Plaintiffs' terminations have nothing do with union busting, discriminating against union members, and the right of employees to organize or any other unfair labor practice. See, *Suarez v. Gallo Wine Distributors, Inc,* 32 AD3d 737 (NY App 2006). *§ 8(a) (4)* of the NLRA only provides protection for employees who testify before the NLRB or cooperate in an NLRB investigation—not to the DOL. Plaintiffs' WPA claim is not an issue "identical" to one that could have been filed with the NLRB. State court jurisdiction over Plaintiffs' WPA will not interfere with or frustrate *any* federal labor laws.

D. Neither Plaintiffs Nor Defendants Ever Sought Relief From the NLRB.

Whether a party first sought relief through the NLRB is "highly relevant" in determining whether the NLRA preempts a state claim. *Platt v. Cooper,* 959 F2d 91, 95 (8th Cir 1992); *Sears Roebuck, supra* at 202, 231-232. "The risk of interference with the Board's jurisdiction is ...obvious and substantial" when an unsuccessful charge to the Board is recast as a state law claim. *Local 926, IUOE v. Jones,* 460 US 669, 683 (1983). As the Eleventh Circuit said in

Parker v. Connors Steel Co, 855 F2d 1510, 1517 (11th Cir 1988, cert. denied, 490 US 1066 (1989):

> We believe that the [*Garmon* preemption] rationale has the greatest validity when a party has sought redress for his claims from the NLRB and in the face of an adverse decision the claims are restructured as state claims and pursued in state court.

Also see, *Local Union No. 12004, United Steel Workers of America v. Commonwealth of Massachusetts,* 377 F3d 64, 80 (1st Cir 2004) ("Under *Sears Roebuck,* there is a strong argument that the rationale for *Garmon* preemption is less powerful when a party voluntarily chooses to forego the primary jurisdiction of the NLRB.")

This point is highlighted by the very cases cited by Defendants. *Platt* involved a truck driver whose union filed a grievance under the collective bargaining agreement objecting to his firing. *Id.* at 92-93. The plaintiff then filed a charge with the NLRB (a fact omitted by Defendants in their recitation) which alleged he was fired "because of his union and concerted activities." *Id.* at 93. When the NLRB declined to issue a complaint, the plaintiff filed an action in state court that he was fired for safety complaints rather than for "union and protected concerted activities." *Id.* at 94.

The Eight Circuit found that the NLRA preempted the plaintiff's claims because: (1) the collective bargaining agreement protected his right to make safety complaints and (2) the challenged conduct occurred in the context of a labor dispute and he could have filed an unfair labor practice with the NLRB based on the collective bargaining agreement and (3) "it is highly relevant that Platt unsuccessfully sought relief through the grievance process, and the NLRB before commencing suit." *Id.* at 95. Significantly, the *Platt* court, *id.*, wrote:

We do not reach the question whether employee suits seeking redress for violation of state whistle-blower statutes are generally preempted under *Garmon* because we believe the "local interest" exception to *Garmon* requires a more fact sensitive approach. (Bold added)

Rodriguez v. Yellow Cab Cooperative, Inc., 206 Cal App 3d 668 (Cal App 1998), another case cited by Defendants, further illustrates this point. In *Rodriguez*, the plaintiff, a union organizer, was fired after he filed a class action lawsuit on behalf of the union and testified on behalf of the union before the California Public Utilities Commission (PUC). *Id.* at 662, 674. After his firing, the plaintiff filed an unfair labor practice charge with the NLRB claiming that he was discharged in retaliation for his union activities. *Id.* at 672. After the NLRB investigated and dismissed the charge, plaintiff filed a claim in state court in which he alleged that he was fired because of his testimony before the PUC and because he filed the class action suit against his employer.

In holding that the plaintiff's recast state claim was preempted under *Garmon* and *Sears,* the *Rodriguez* court reasoned:

> It is clear that a state court would look at the same aspects of appellant's situation as the Board. The NLRB refused to take action on appellant's charge because it found respondent had "disciplined many other employees engaging in similar conduct" and that appellant was not treated differently from other employees with a similar work record. This would also be the central issue at a trial in state court. That is, appellant could not hope to prevail at such a trial without disproving the factual finding before the NLRB[30].

Id. at 678-679. Accordingly, preemption was appropriate because there was "a 'realistic threat' that a state judicial proceeding would impinge on 'the federal regulatory scheme.'" *Id.* at 679, citing *Farmer, supra,* at 305.That "threat," however, is not a possibility in Plaintiffs' WPA case.

[30] Contrary to Defendants assertion, and as stated in the quoted passage, the *Rodriguez* plaintiff *did* file charges with the NLRB on the very issue presented in his state court action. (Brief on Appeal, p. 28.)

Similarly, in *MVM v. Rodriguez,* 568 FSupp 2d 158 (DC PR 2008), a District Court found that a plaintiff's whistleblower claim was preempted because he submitted the same claim to the NLRB. *Id.* at 178. The *MVM* court found that permitting the state whistleblower action to go forward presented a "substantial threat of interference with the regulatory scheme because "...there is a claim still pending before the NLRB and deciding this controversy entails an obvious risk of creating inconsistent judgments in distinct fora." *Id.* at 179.

The danger of NLRB interference addressed in *Platt, Rodriguez* and *MVM* simply does not exist in the case *sub judice*. No party filed a charge with the NLRB on any matter, nor could they. This case does not involve a collective bargaining agreement, union busting, discrimination against union members, or other matters expressly protected or prohibited by the NLRA. Plaintiffs' claims do not "purport to regulate any conduct subject to regulation by the NLRB" and the NLRB's position as the authoritative interpreter of the NLRA is not threatened. *Fort Halifax Co v. Coyne,* 482 US 1, 22 (1987). A state court proceeding on Plaintiffs' WPA claim will not conflict with any determination of the NLRB or interfere with the federal regulatory scheme. Plaintiffs' WPA claims are peripheral to the NLRA. Accordingly, Plaintiffs' WPA claims are not subject to preemption.

E. Plaintiffs' WPA Claims are of Peripheral Concern to the Purposes of the NLRA or Touch Upon Matters Deeply Rooted in Local Feeling and Responsibility.

State regulation of activity will not be preempted under *Garmon* if the activity is "a merely peripheral concern" of the NLRA, or if it "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it cannot be

inferred that Congress removed the state power to act." 359 US at 243-245. And state jurisdiction will not be ousted "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by federal labor statutes." *Farmer v. United Bhd of Carpenters and Joiners of Am, Local 25,* 430 US 290, 297 (1977) (citation omitted). When analyzing whether a law is preempted under *Garmon,* courts conduct a "balanced inquiry" into the nature of the interests at stake and the "effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Id.* at 300-301.

1. **Plaintiffs' WPA claims for retaliatory discharge because they reported suspicions of union corruption to the DOL is peripheral to the concerns of the NLRA.**

In *Roussel v. St. Joseph Hospital,* 257 FSupp 2d 280 (DC ME 2008), the District Court found that the NLRA did not preempt a state whistleblower claim. *Roussel* involved a nurse who was fired after she complained to Maine Labor Bureau about hours and working conditions. The *Roussel* court found that plaintiff's claims that defendant terminated her employment for exercising her rights under the Maine Whistleblower Protection Act were "merely peripheral to the NLRA." *Id.* at 285, citing *Veal v. Kerr-McGee Coal Corp,* 682 FSupp 957 (SD Ill 1988) (finding that plaintiff's claim for retaliatory discharge resulting from filing a workmen's compensation claim not preempted by the NLRA because the conduct was only of peripheral concern to the Act's purpose).

As acknowledged by Defendants in their lower court pleadings, Plaintiffs' WPA claim stems from their discharge in retaliation for their reports to the DOL of Aaron's suspected kickback scheme. Plaintiffs' state action does not request or require any state court to regulate wages, working conditions or interpret a collective bargaining agreement (there is none). Even if Plaintiffs' WPA claims required factual overlap with issues arguably covered by the NLRA that would not justify preemption: "Although the analysis of a state law claim may involve attention to the same factual considerations as a charge before the National Labor Relations Board, such parallelism does not require *Garmon* preemption." *Zavadil v. Alcoa Extrusions, Inc,* 437 FSupp 2d 1068, 1075 (DC SD 2006) citing *Lingle v. Norge Div of Magic Chef, Inc,* 486 US 399, 408 (1988).

The fact that Plaintiffs incidentally mentioned to the DOL criminal investigators that Aaron required members (later found to be "volunteers") to work in unsafe conditions for non-union wages and repeated this in the complaint, does nothing to interfere with any federal regulatory scheme. Even if this Court accepted Defendants' misleading narrative, the ultimate issue would remain whether Plaintiffs were engaged in activity expressly protected under the WPA. Because this case involves two employees who worked for a union does not transform this case into one preempted under *Garmon.* Indeed, if the Court were to adopt Defendants argument, labor unions would effectively be exempt and unaccountable in a state court for violating a Michigan citizen's WPA civil rights. Persons engaged in criminal activity would be further insulated. This is not what the WPA or *Garmon* and its spawn contemplate.

Plaintiffs' claims do not "purport to regulate any conduct subject to regulation by the NLRB" and the NLRB's position as the authoritative interpreter of the NLRA is not threatened or otherwise jeopardized. *Fort Halifax Co v. Coyne,* 482 US 1, 22 (1987). Accordingly, Plaintiffs' WPA claims are peripheral to the core purpose of the NLRA to maintain "industrial peace."

2. **The WPA touches on interests deeply rooted in local feeling and responsibility.**

The WPA has been Michigan law for over 30 years. The Michigan Legislature provided Michigan citizens with protection against retaliation when they engaged in protected activity as defined by the statute. The purpose was, as discussed above, to encourage and promote employees to report suspected wrongdoing to public bodies, including law enforcement. Reports to law enforcement are especially important because they implicate criminal conduct. The public benefit derived from whistleblowers is obvious and undeniable because it brings wrongful acts into the light for public bodies to do with what they deem best. It is expansive and applies to all employers, public and private alike. It makes no exceptions for profits or non-profits, including labor unions. This should hold true where the reports involve suspected criminal activity, as they do here.

Plaintiffs were covered by the WPA, reported suspected illegal activity to law enforcement and were fired because they "blew the whistle." Plaintiffs' reports to the DOL advanced the very interests embodied by the state statute. The policies underlying the WPA stem from deeply rooted interests and touch upon local feeling that employees who disclosure wrongdoing receive protection from retaliation by their employer—virtues which, under

Garmon, are not subsumed by the NLRA. Accordingly, the NLRA does not preempt Plaintiffs' WPA claims.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, Plaintiff-Appellees respectfully request this Court to vacate the order granting leave as it was improvidently issued or, in the alternative, affirm the Court of Appeals.

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Dated: June 18, 2013

STATE OF MICHIGAN
SUPREME COURT

ANTHONY HENRY and KEITH WHITE,

Plaintiffs-Appellees,

vs.

LABORERS LOCAL UNION 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 and MICHAEL AARON and BRUCE RUEDISUELI,

Defendants-Appellants.

And

BRUCE RUEDISUELI,

Defendant,

And

MICHAEL RAMSEY and GLENN DOWDY,

Plaintiffs-Appellees,

vs.

LABORERS' LOCAL 1191 d/b/a/ ROAD CONSTRUCTION LABORERES OF MICHIGAN LOCAL 1191 and MICHAEL AARON,

Defendants-Appellants,

And

BRUCE RUEDISUELI,

Defendant.

Supreme Court No.: 145631
Court of Appeals No.: 302373
Wayne County Circuit Court
No.: 10-000384-CD

Wayne County Circuit Court
Hon.: Jeanne Stempien

Supreme Court No.: 145632
Court of Appeals No.: 302710
Wayne County Circuit Court
No.: 10-004708-CD

Wayne County Circuit Court
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NOTICE OF ERRATA

Page 9, footnote 9 needs as follows: "Nowhere in their trial court or Court of Appeals Brief did Defendants claim that Plaintiffs were discharged because they complained about union wages or work safety or to aid or protect the TULC volunteers. Nor did Defendants argue that the NLRA preempted Plaintiffs' WPA claims."

Page 9, footnote 9 should read, "Nowhere in their trial court or Court of Appeals Brief did Defendants claim that Plaintiffs were discharged because they complained about union wages or work safety or to aid or protect the TULC volunteers. Nor did Defendants argue *before the trial court* that the NLRA preempted Plaintiffs' WPA claims."

Respectfully submitted,

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Dated: June 20, 2013

ANTHONY HENRY and KEITH WHITE, Plaintiffs-Appellees, v LABORERS LOCAL 1191, d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 and MICHAEL AARON, Defendant-Appellants and BRUCE RUEDISUELI, Defendant-Appellee. MICHAEL RAMSEY and GLENN DOWDY, Plaintiffs-Appellees, v LABORERS LOCAL 1191, d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 and MICHAEL AARON, Defendants-Appellants, and BRUCE RUEDISUELI, Defendant-Appellee.

No. 302373, No. 302710

COURT OF APPEALS OF MICHIGAN

2012 Mich. App. LEXIS 1319

July 3, 2012, Decided

NOTICE: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

SUBSEQUENT HISTORY: Appeal granted by *Henry v. Laborers Local 1191, 493 Mich. 934, 825 N.W.2d 578, 2013 Mich. LEXIS 130 (2013)*
Motion granted by *Henry v. Laborers Local 1191, 2013 Mich. LEXIS 689 (Mich., May 3, 2013)*

PRIOR HISTORY: [*1]
Wayne Circuit Court. LC No. 10-000384-CD. Wayne Circuit Court. LC No. 10-004708-CD.

JUDGES: Before: RONAYNE KRAUSE, P.J., and SAAD and WILDER, JJ.

OPINION

PER CURIAM.

In these consolidated appeals, defendants Laborers Local 1191 (Local) and Michael Aaron (Aaron) (defendants) appeal by leave granted orders of the Wayne Circuit Court denying their motions for summary disposition pursuant to *MCR 2.116(C)(4)*. Plaintiffs commenced this action under Michigan's Whistleblower Protection Act (WPA), *MCL 15.361 et seq.*, on the basis of the termination of their employment as business agents of Local 1191, a labor union. Aaron was the union's business manager. Plaintiffs contend that they were terminated from their employment--and bring no claims based on any alleged infringement of their membership rights--because they reported or participated in an investigation of allegedly illegal conduct in which they believed the union had engaged. Defendants' motions for summary disposition contended that the Federal Labor Management Reporting and Disclosure Act (LMRDA), *29 USC 401 et seq.*, and National Labor Relations Act (NLRA), *29 USC 151 et seq.*, preempt plaintiffs' state law claims. We affirm.

Congress has the power to preempt [*2] state law. *US Const, art 6, cl 2*. However, we generally presume that it does not, *Duprey v Huron & Eastern R Co, Inc, 237 Mich App 662, 665; 604 NW2d 702 (1999)*, and that presumption can be overcome only where Congress clearly and unequivocally intends to do so. *Wayne Co Bd of Comm'rs v Wayne Co Airport Authority, 253 Mich App 144, 198; 688 NW2d 804 (2002)*. Preemption may be

express, where Congress has explicitly stated its intent to preempt state law; "field," where state law regulates conduct in a field that Congress has intended to occupy exclusively; or "conflict," where state law is in actual conflict with federal law. *Grand Trunk Western Railroad Co v City of Fenton, 439 Mich 240, 243-244; 482 NW2d 706 (1992).* Defendants contend that both field preemption and conflict preemption apply here. Field preemption requires federal law to occupy a field so thoroughly that it is reasonably inferable that Congress did not intend to permit states to supplement it. *Cipollone v Liggett Group, Inc, 505 U.S. 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992).* Conflict preemption occurs "where it is impossible for a private party to comply with both state and federal requirements," or where the **[*3]** state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English v General Electric Co, 496 U.S. 72, 79; 110 S Ct 2270; 110 L Ed 2d 65 (1990)* (citation omitted). "If a state-law proceeding is preempted by federal law, the state court lacks subject-matter jurisdiction to hear the state-law cause of action." *Packowski v United Food & Commercial Workers Local 951, 289 Mich App 132, 139-140; 796 NW2d 94 (2010).*

Section 2 of the WPA provides:

> An **[*4]** employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.[1] [*MCL 15.362* (footnote added).]

"[T]he only rationale for the WPA" is "to encourage those actions that assist in the protection of the public by in turn protecting the employee." *Chandler v Dowell Schlumberger, Inc, 214 Mich App 111, 122; 542 NW2d 310 (1995).* Under the WPA, an "employee" is in relevant part "a person who performs a service for wages or other renumeration under a contract of hire, written or oral, express or implied" *MCL 15.361(a).* An "employee" is in relevant part "a person who has **[*5]** 1 or more employees." *MCL 15.361(b).* Of particular significance, plaintiffs' claims arise out of the termination of their employment by Local 1191.

> 1 Plaintiffs reported the alleged illegal conduct to, or participated in an investigation by, the United States Department of Labor. Under *MCL 15.361(d)*, a federal agency may qualify as a law enforcement agency and, thus, a "public body." *Ernesting v Ave Maria College, 274 Mich App 506, 514-515, 517; 736 NW2d 574 (2007)* (concluding that the Department of Education was a law enforcement agency).

The LMRDA "was the product of congressional concern with widespread abuses of power by union leadership." *Finnegan v Leu, 456 U.S. 431, 435; 102 S Ct 1867; 72 L Ed 2d 239 (1982).* Title I of the Act, 29 USC 411-415, was introduced as the "Bill of Rights of Members of Labor Organizations." *Finnegan, 456 U.S. at 435.* The *Finnegan* Court found that "it was rank-and-file union members--not union officers or employees, as such--whom Congress sought to protect." *Id. at 437.* "[T]he Act's overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Id. at 441.* **[*6]** "[T]he ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Id.* "Consequently there is no violation of the LMRDA if a staff member's discharge, which does not affect his union membership, is based on union patronage, because the loyalty and cooperation of union employees is necessary to insure that the union is democratically governed and responsive to its membership." *Montoya v Local Union III of the Int'l Brotherhood of Electrical Workers, 755 P2d 1221, 1223 (Colo App, 1988).*

This Court recently concluded that the LMRDA conflicts with and preempts a state wrongful-discharge claim based on a just-cause termination policy. *Packowski, 289 Mich App at 136, 144.* The "plaintiff's claim would conflict with the efforts of elected union

officials to implement the policies on which they were elected and, in that way, interfere with one of the purposes of the LMRDA." *Id. at 148.* "The democratic purposes of the LMRDA would be contravened by allowing a demoted or discharged business agent or organizer to sue for wrongful discharge." *Id. at 144.* Significantly, however, [*7] *Packowski* only considered the "plaintiff's claim that he was terminated without just cause." *Id. at 134.* Consequently, an exception to preemption, recognized in other cases, where a union employee claims wrongful discharge for refusing "to commit or aid in committing a crime," did not apply because the plaintiff in *Packowski* was terminated for failing to follow legitimate policies, not for refusing to commit or aid in committing a crime. *Packowski, 289 Mich App at 146.* This Court also noted that any claim for retaliation for participating in the Department of Labor investigation could be brought in federal court under *§ 412. Packowski, 289 Mich App at 146 n 3.* This Court did *not* purport to decide whether doing so was the only way for such a party to seek relief, and we likewise do not do so here.

In *Smith v Int'l Brotherhood of Electrical Workers, Local Union 11, 109 Cal App 4th 1637, 1653-1654; 1 Cal Rptr 3d 374 (2003)*, finding that the LMRDA did not preempt an action "arising out of job discrimination based on age or disability," the court noted that "courts need not be concerned about 'patronage' suits masquerading as suits for wrongful discharge based on age or disability." We appreciate [*8] defendants' concerns that a patronage suit *could* masquerade as some other wrongful discharge suit, so it is especially important for plaintiffs to show a causal connection between their reporting and the discharge in order to establish a prima facie case. *Chandler, 214 Mich App at 114.* Furthermore, "[t]he trial court must exercise caution . . . to minimize introduction of any evidence that plaintiff's political views differed from those of [the business manager]" in order "to assure that the doctrine of preemption is not violated." *Montoya, 755 P2d at 1224.* However, plaintiffs contended that defendants' acts were criminal and involved more than "the federal regulatory scheme and the union's own internal operating policies." *Dzwonar, 348 NJ Super at 173.* Protecting terminations where an employee reports a crime, thereby refusing to conceal it, would also "encourage and conceal" criminal acts and coercion and would not "serve union democracy." *Bloom v Gen Truck Drivers, Office, Food & Warehouse Union, Local 952, 783 F2d 1356, 1362 (CA 9, 1986).* Accordingly, plaintiffs' WPA claims are not conflict-preempted by the LMRDA.

We also find no field preemption. This Court in *Packowski* noted, [*9] in dicta, that "*29 USC 412* provides for a civil action in federal court if there is retaliation based on giving truthful testimony to the Department of Labor." *Packowski, 289 Mich App at 146 n 3. Section 412* of the LMRDA provides:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

As noted by the dissenting opinion in *Packowski*, "in general the LMRDA protects the rights afforded union *members* because of their status as members, not the rights afforded appointed union *employees* because of their status as employees." *Packowski, 289 Mich App at 152 n 1* (Beckering, P.J., dissenting), citing *Finnegan, 456 U.S. at 436-437* (emphasis in original). In *Bloom*, the plaintiff's claim was actually based on his firing as a business agent, which was not intended to be prohibited [*10] by the LMRDA. *Bloom, 783 F2d at 1359*, citing *Finnegan, 456 U.S. at 436-437.* Without an infringement on the plaintiff's rights as a union member, the plaintiff had no cause of action under § 411 and *§ 412. Bloom, 783 F2d at 1359.* Here, plaintiffs brought their claims as employees and have not alleged any infringement on their membership rights, so they have no cause of action under *§ 412.* See *Bloom, 783 F2d at 1359.*[2]

> 2 Defendants also cite *Ardingo v Potter, 445 F Supp 2d 792 (W D Mich, 2006)*, for support of their argument that the LMRDA provides plaintiffs' exclusive remedy. However, in *Ardingo*, the plaintiff's wrongful discharge claim was based on exercising his free speech rights under the LMRDA. *Ardingo, 445 F Supp 2d at 798.*

In *Sheet Metal Workers' Int'l Ass'n v Lynn, 488 U.S. 347, 355; 109 S Ct 639; 102 L Ed 2d 700 (1989)*, the Court considered "whether the retaliatory removal of an elected official violates the LMRDA." *Lynn, 488 U.S. at 353*. The Court held that an elected official had a cause of action for retaliatory removal. *Id. at 355*. The Court stated that "the potential chilling effect on Title I free speech rights is more pronounced when elected officials are discharged." *Id.* [*11] This does not suggest that an appointed business agent has a cause of action under the LMRDA. A § 102 [*29 USC 412*] claim might arise if a union official were dismissed 'as "part of a purposeful and deliberate attempt . . . to suppress dissent within the union."' *Lynn, 488 U.S. at 355 n 7* (citation omitted). There is no indication that plaintiffs here were terminated as part of such an attempt. We do note that sections 413 and 523(a) only save causes of action by a union member, not actions brought--as plaintiffs do here--as an employee. *Bloom, 783 F2d at 1360*. However, *Bloom* implied that the plaintiff could maintain his action if a federal interest did not preclude the cause of action. *Id. at 1361*. We find that plaintiffs' claims are not preempted.

Defendants finally argue that the NLRA preempts plaintiffs' WPA claims. The trial court did not decide this issue, but a challenge to subject-matter jurisdiction may be made at any time, and we conclude that defendants may do so even though our grant of leave to appeal was limited to the issues raised in the applications. See *Smith v Smith, 218 Mich App 727, 729-730; 555 NW2d 271 (1996)*. We [*12] find that the NLRA does not preempt plaintiffs' claims.

Section 7 of the NLRA, *29 USC 157*, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in *section 158(a)(3)* of this title.

Section 8 provides, in part, that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in *section 157*." *29 USC 158(a)(1)*.[3]

> 3 *29 USC 158(b)(1)* is a similar provision applying to labor organizations and their agents.

"When an activity is arguably subject to [§] 7 or [§] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board [(NLRB)] if the danger of state interference with [*13] national policy is to be averted." *San Diego Bldg Trades Council, Millmen's Union, Local 2020 v Garmon, 359 U.S. 236, 245; 79 S Ct 773; 3 L Ed 2d 775 (1959)*. However, there are exceptions to the NLRB's primary jurisdiction. *Chaulk Servs, Inc v Mass Comm Against Discrimination, 70 F3d 1361, 1364 (CA 1, 1995)*. The states may regulate activity that is only of "'peripheral concern' to federal labor policy" or that is "'so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the states of the power to act.'" *Id. at 1364-1365* (citations omitted). "[T]he critical inquiry [for the latter] is whether the controversy presented to the state court is identical to or different from that which could have been presented to the NLRB." *Id. at 1366*.

In *Calabrese v Tendercare of Mich, Inc, 262 Mich App 256, 260; 685 NW2d 313 (2004)*, this Court found the plaintiff's claims of wrongful discharge and tortious interference preempted by the NLRA. The plaintiff claimed she was terminated for refusing "to fire employees for legal unionizing activities." *Calabrese, 262 Mich App at 259*. The Court found this [*14] an unfair labor practice under § 8, so the claims could have been brought before the NLRB. *Calabrese, 262 Mich App at 262-263*. In *Flores v Midwest Waterblasting Co*, unpublished memorandum opinion and order of the Eastern District of Michigan, issued September 26, 1994 (Docket No. 93-72586), 1994 WL 16189543, the court found a WPA claim preempted by the NLRA under *Garmon*. The court relied on the fact that the plaintiffs had only reported misconduct to the NLRB, which is a protected activity; in contrast, if the plaintiffs had identified any public bodies other than the NLRB to which they had allegedly made reports, the NLRA would not necessarily have applied and the WPA claim would not have been preempted. *Flores*, 1994 WL 16189543 at

*9 and *9 n 4. Alternatively, in *Roussel v St Joseph Hosp, 257 F Supp 2d 280, 285 (D Maine, 2003)*, the court found that a Maine Whistleblowers' Protection Act claim was not preempted by the NLRA. The court found that even if the plaintiff had engaged in concerted activity, her claim that she was terminated in retaliation for exercising her rights under the Maine Whistleblowers' Protection Act was peripheral to the NLRA. *Id.*

Plaintiffs asserted that they **[*15]** reported their "suspicions of illegal activity" to either the United States or Michigan Department of Labor, not to the NLRB. Furthermore, we agree with the reasoning in *Roussel*. A claim for retaliatory discharge arising out of an employee's report of suspected illegal activity or participation in investigation thereof is only of peripheral concern to the NLRA's purpose of protecting employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Roussel, 257 F Supp 2d at 285*. Therefore, plaintiffs' WPA claims are not preempted.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Henry William Saad

/s/ Kurtis T. Wilder

B

VICTOR A. FLORES, GLENN HEIMBACH, JAMES L. BAUGHEY, Jr., ROBERT BAUGHEY, RICHARD A. DE LA CRUZ, and ROBERT H. PHILLIPS, Plaintiff, v. MIDWEST WATERBLASTING COMPANY, a Michigan Corporation; INDUSTRIAL SERVICES, Inc., a Michigan Corporation; INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, DETROIT DISTRICT COUNCIL NO. 22 OF PAINTERS; ALAN L. SCHAFER, an individual; RANDALL B. MARTOLOCK, an individual; and ROBERT KENNEDY, an individual; jointly and severally, Defendants.

No. 93-72586

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

1994 U.S. Dist. LEXIS 17704

September 26, 1994, Decided

JUDGES: [*1] Nancy G. Edmunds, U.S. District Judge

OPINION BY: Nancy G. Edmunds

OPINION

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter has come before the Court upon Defendants' motion for summary judgment. Plaintiffs Victor Flores and other current and former employees of Industrial Services, Inc., filed a complaint in state court alleging that Defendant employers and their representatives failed to comply with the terms of a collective bargaining agreement and failed to disclose the existence of the collective bargaining agreement, and that the Defendant Union and its agent breached its duty of air representation by taking no action to enforce the terms of the labor agreement. Defendants removed the action to federal court. Plaintiffs filed a motion to remand to state court, but in September, 1993, this court denied Plaintiffs' motion, finding it had jurisdiction of at least one of Plaintiffs' claims. All Defendants on February 3, 1994, filed this motion for summary judgment, contending that Plaintiffs' state law claims are preempted by § 301, that Plaintiffs' breach of contract claim should be dismissed because of the Plaintiffs' failure to exhaust their remedies in [*2] the collective bargaining agreement, and that Plaintiff's breach of the duty of fair representation claim is foreclosed by the principles of majority rule and exclusive representation. For the reasons stated below, Defendants' motion for summary judgment is granted.

I. Facts

Plaintiff employees of Defendant Industrial Services, Inc., ("Defendant employer") contend that in September, 1992, they became interested in joining a labor organization. To that end, they contacted a representative of the United Steelworkers of America ("Steelworkers") to pursue organizational efforts on their behalf. Much to the surprise of Plaintiffs, the Steelworkers representative

discovered that the employees were already covered by a collective bargaining agreement ("CBA") executed between Industrial Services and Defendant International Brotherhood of Painters and Allied Trades, Detroit District Council No. 22 ("Painters Union"). This CBA covered the employees from January, 1990 to December, 1992. It was preceded by another CBA, which covered the employees from 1988 through December, 1989. [1]

> 1 The first CBA was executed between the Painters Union and Defendant Midwest Waterblasting Co. Midwest Waterblasting employed most of the Plaintiffs before they became employees of Industrial Services. At the time this suit was brought, Midwest Waterblasting typically entered into contracts to conduct waterblasting for customers, such as automobile plants, and then subcontracted with Industrial Services for performance. Defendant Alan Schafer is the sole shareholder of Midwest Waterblasting. Defendant Randall Martolock is the sole shareholder of Industrial Services.

[*3] It was further discovered that the employers had compensated their employees at a rate less than provided in the CBA, that the employers had provided employees with an employee handbook containing a grievance procedure contradicting the procedures contained in the CBA, and that the employers had paid to the Painters Union, through its officer Defendant Robert Kennedy, the equivalent of union dues and had made contributions to union pension funds. At no time prior to the Steelworkers' discovery did the Painters Union contact the employees or provide any assistance to the employees that a collective bargaining agent normally provides.

Most of the employers' customers own "union shops." Therefore, the employers regularly provided its employees with union cards to carry to customer sites. Once the employees were on site, the employers collected the union cards from the employees. The employees claim that the employers told them that the union cards were merely a formality and that the employees were not in fact members of a union.

Plaintiffs further claim that once they learned of the existence of the CBAs, the employers harassed and threatened to discharge the employees if they pursued **[*4]** the matter and subsequently reduced the number of hours the complaining employees could work.

The Painters Union convened a meeting October 3, 1992, once it learned that the Steelworkers had discovered the existence of the CBA. At that meeting the Painters Union distributed copies of the CBA and reviewed it with the employees. In December, 1992, the Painters Union filed a representation petition with the National Labor Relations Board ("NLRB") seeking to be designated as the majority representative of the affected employees. The NLRB held the election in January, 1993. The Painters Union won the election by a vote of S-7. The NLRB certified the Painters Union as the collective bargaining representative of the affected employees, including Plaintiffs, on February 10, 1993. No challenge to the conduct of the election was filed with the NLRB.

Simultaneously, Industrial Services and the Painters Union met to negotiate the terms of a new CBA and to settle the issue of Industrial Services' failure to comply with the terms of the prior CBAs. An agreement was concluded and submitted to a vote of the employees on February 4, 1993. A 9-8 majority of the employees voted to ratify the new CBA **[*5]** and the settlement proposal. As a result, Industrial Services issued these employees checks which were thereafter cashed.

Article XX of the 1990-92 CBA provides for the arbitration of any "complaint or request of an employee which involves the interpretation or application of or compliance with the provisions of" the CBA. At no time after being informed in October, 1992, of the existence and contents of the CBA did any Plaintiff file a grievance pursuant to the CBA.

Plaintiffs' claims consist of the following nine counts: misrepresentation fraud, breach of the duty of fair representation, breach of fiduciary duty, breach of third party contract, unjust enrichment, civil conspiracy, intentional infliction of emotional distress, violation of the Michigan Whistleblowers' Protection Act, and constructive retaliatory discharge.

II. Standard for Summary Judgment

In considering a motion for summary judgment, the Court may grant the motion only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. As the Supreme Court ruled in *Celotex*, "*Rule 56(c)* mandates the entry of summary judgment, after **[*6]** adequate time for discovery and upon motion,

against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).*

The court must view the allegations of the complaint in the light most favorable to the non-moving party. *Windsor v. The Tennessean, 719 F.2d 155, 155 (6th Cir. 1983).* "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

However, the mere existence of a scintilla of evidence in support of the non-movant is not sufficient; there must be sufficient evidence upon which a jury could reasonably find for the non-movant. *Liberty Lobby, 477 U.S. at 252.*

"The movant has the burden of showing that there is no genuine [*7] issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Id. at 256.* "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue' for trial." *Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989)* (citing *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).*

III. Analysis

A. Introduction

Plaintiffs' claims can be grouped into the following four categories: (i) that Defendant employers breached the CBA between the employers and the Painters Union; (ii) that the employers fraudulently misrepresented to Plaintiffs the non-existence of the CBA; (iii) that the employers retaliated against Plaintiffs for pursuing their claims; and (iv) that the Painters Union breached the duty of fair representation and a fiduciary duty to Plaintiffs. The first two categories of Plaintiffs' claims are in essence [*8] a breach of a collective bargaining agreement claim that is preempted by § 301 and is dismissed for failure to exhaust contractual remedies. The third category of Plaintiffs' claims are preempted under the Court's *Garmon* principle. *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959).* The final category of Plaintiffs' claims are preempted by § 301 and are dismissed because the Union's settlement of The dispute was not wholly irrational or arbitrary. Even if the Union did breach the duty of fair representation, union official Robert Kennedy is immune from suit.

B. Preemption

Plaintiff's state law claims are all preempted. Most of their claims are preempted by § 301. The others are preempted under the *Garmon* principle.

1. Section 301 preemption

All of Plaintiffs' claims that Defendant employers breached the CBA between the employers and the Painters Union and that the employers fraudulently misrepresented to Plaintiffs the nonexistence of the CBA are preempted by § 301.

> Under § 301 of the tabor Management Relations Act,
>
> Suits for violation of contracts between [*9] an employer and a labor organization representing employees in an industry affecting commerce. . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

185 U.S.C. § 185(a). In a series of cases since 1962, the Supreme Court has made clear that § 301 preempts any state law claim arising from a breach of a collective bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 100 L. Ed. 2d 410, 108 S. Ct. 1877 (1988); Caterpillar, Inc. v. Williams, 482 U.S. 386, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985); Teamsters v. Lucas Flour Co., 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571 (1962).*

Two federal labor law policies underlie the Court's preemption doctrine: the need [*10] for uniformity in the interpretation of collective agreements and the importance of arbitration to the resolution of labor

disputes. The Supreme Court has held that labor Contracts must be interpreted according to a uniform federal law because "(the possibility that individual contract terms night have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lucas Flour, 369 U.S. at 103-04.* The negotiation of labor agreements, and any disputes arising under them, would be prolonged if labor and management had to consider the meaning of collective agreement terms under competing legal systems. *Id.* Therefore, "the meaning given to terms in collective bargaining agreements must be determined by federal law." 11 *Lueck,* 471 U.S. at 210.

Further, the Court's preemption doctrine preserves the effectiveness of arbitration as a means to resolve labor disputes. *Lueck, 471 U.S. at 219.* "A rule that permitted an individual to sidestep available grievance procedures **[*11]** would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id., 471 U.S. at 220.*

But "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the federal labor law." *Id., 471 U.S. at 211.*

> Even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes.

Lingle, 486 U.S. at 409-10. Thus, state courts may evaluate state law claims "involving labor-management relations only if such claims do not require construing **[*12]** collective-bargaining agreements." *Id.*

The Sixth Circuit has developed a two-step approach for determining whether § 301 preemption applies. *DeCoe v. General Motors Corp.,* F.3d , No. 93-1225, slip op. at 6 (6th Cir. July 24, 1994), 1994 WL 282466.

> First, the district court must examine whether proof of the state law claim requires interpretation of collective bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law. If the right is borne of state law and does not invoke contract interpretation, then there is no preemption. However, if neither or only one criterion is satisfied, section 301 preemption is Warranted.

Id.; see also Caterpillar, 482 U.S. at 394 ("Section 301 governs claims founded directly on rights created by the collective bargaining agreement, and also claims substantially dependent on analysis of a collective bargaining agreement."); *Tisdale v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 704, 25 F.3d 1308, 1310-11 (6th Cir. 1994).* **[*13]**

a. Breach of contract

Plaintiffs' complaint appears to assert three varieties of a breach of contract claim. Plaintiffs allege that (i) Defendants breached a third party contract of which Plaintiffs were the intended beneficiaries, that (ii) they are entitled to further relief under a theory of unjust enrichment, and (iii) that Defendants committed a civil conspiracy. All three of these breach of contract claims are preempted by § 301 because the claims depend upon the existence of collective bargaining agreements.

(1) Breach of third party contract

Plaintiffs allege that they were the intended beneficiaries of CBAs between the employers and the Painters Union. Plaintiffs further allege that Defendant employers breached the CBAs in two ways: first, by failing to compensate and provide benefits consistent with the terms of the CBAs; and, second, by failing to advise Plaintiffs of the existence of the CBAs and failing to pursue Plaintiffs' rights arising under the CBAs.

Section 301 preempts all breach of contract claims where the allegedly breached contract is a CBA or was created pursuant to a CBA. *Jones v. General Motors, 939*

F.2d 380, 383 (6th Cir. 1991); [*14] *Ulrich v. Goodyear Tire & Rubber Corp., 884 F.2d 936, 938 (6th Cir. 1989).* In *Jones,* the plaintiff claimed that his employer, by refusing to reinstate him, breached a settlement agreement arrived at by virtue of a CBA-established grievance procedure. The court held that § 301 preempted plaintiff's breach of contract claim because both the right claimed by plaintiff and the relationship between the Parties embodied in the settlement agreement existed because of the CBA. *Jones, 939 F.2d at 382-83.*

Here, Plaintiffs' breach of third party contract claim depends upon the existence of the 1988-90 and 1990-92 CBAs. But for those CBAs, Plaintiffs could not claim that they are the intended beneficiaries of a contract and thus entitled to damages for its breach. Thus, Plaintiffs' breach of third party contract claim is created by the CBA. Plaintiffs' claim is therefore preempted by § 301 under *DeCoe* and *Jones.*

(2) Unjust enrichment

Plaintiffs further allege that they are entitled to relief under a theory of unjust enrichment. Specifically, Plaintiffs claim that all Defendants received benefits from Plaintiffs' labor, [*15] and that "it would be inequitable for Defendants to retain fully these benefits since Plaintiffs were not compensated for their labor, as called for by the collective bargaining agreement." Complaint, para. 61-63.

The elements of a claim to impose a quasi-contract to prevent unjust enrichment are: "(i) receipt of a benefit by the defendant from the plaintiff and, (ii) which benefit it is inequitable that the defendant retain." *Dumas v. Auto Club Ins. Ass'n, 437 Mich. 521, 546, 473 N.W.2d 652, 663 (1991).* Plaintiffs' unjust enrichment claim is preempted because in order to determine whether it is inequitable for Defendants to retain the benefits of Plaintiffs' labor, the court must look to the CBA to see what benefits Defendants specifically were entitled to retain.

(3) Civil Conspiracy

Plaintiffs further allege that all Defendants "acted to deprive Plaintiffs of the compensation and benefits to which they were entitled, and that "Defendants' concerted action had the unlawful purpose of defrauding Plaintiffs of compensation and benefits to which they were entitled, and otherwise achieving purposes that are contrary to contract, labor, [*16] and other laws. Complaint, para. 65-66.

A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. *Admiral Ins. Co. v. Columbia Cas. Ins. Co., 194 Mich. App. 300, 486 N.W.2d 351, 358 (1992).* To the extent that Plaintiff's civil conspiracy claim is derivative of their breach of contract claim, it is preempted by § 301. *Jones, 929 F.2d at 383.* As discussed above, the claim that Defendants accomplished the purpose of breaching CBAs depends on the existence of those CBAs, and thus the right claimed by Plaintiffs is created by the CBAs. [2]

2 Because breach of contract is not "criminal," or "unlawful," it is possible that Defendants are entitled to summary judgment on this claim on grounds other than preemption. But because the Court holds that Plaintiffs' civil conspiracy claim is preempted, the Court does not reach this question.

[*17] (4) Breach of fiduciary duty

According to Plaintiffs' complaint, Defendants breached fiduciary duties to Plaintiffs by "failing to act in the interests of Plaintiffs with respect to their employment, failing to disclose material facts) known to Defendants, and acting only in their self-interest." Complaint, para. 52.

An employer owes no fiduciary duty to its employees at common law. *See Bradley v. Gleason Works, 175 Mich. App. 459, 438 N.W. 2d 330, 332 (1989).* Therefore, Defendants are entitled to summary judgment to the extent that Plaintiffs' claim against their employer is based on a common law fiduciary duty. To the extent that Plaintiffs' claim is based on a contractual fiduciary duty, Plaintiffs' claim is preempted by § 301 because any contractual fiduciary duty arising between the employers and the employees could arise only from a CBA provision.

Further, to the extent that Plaintiffs' breach of fiduciary duty claim is directed against the Painters Union, Plaintiffs' claim is preempted by § 301. Any fiduciary duty of the Painters Union arises from its status as the exclusive bargaining representative of the affected employees. [*18] Therefore, Plaintiffs' state law breach

of fiduciary claim must be resolved by reference to uniform federal labor law concerning the breach of the duty of fair representation. *See United Steelworkers of America v. Rawson,* U.S. , *110 S. Ct. 1904, 1909-11 (1990). Cf. Airline Pilots Ass'n Intern. v. O'Neill,* U.S. , *111 S. Ct. 1127, 1134 (1991)* ("The duty of fair representation is. . . akin to the duty owed by other fiduciaries to their beneficiaries. . ."

b. Misrepresentation/Fraud

Plaintiffs allege that through actual and silent misrepresentations, Defendant employers deprived Plaintiffs or compensation and benefits as well as union assistance, guidance, and representation. Specifically, Plaintiffs allege that when Defendant employers issued union cards to its employees prior to the time they were to enter union shops to perform water blasting services, Defendants told their employees that the union cards were a formality and that the employees were not in fact represented by a union. Two CBAs, however, had been executed between the employers and the Painters Union. Complaint, Ex. A. Plaintiffs **[*19]** further allege that the employers and the Painters Union committed a silent misrepresentation because they had a legal and/or equitable duty to disclose the existence of the CBAs and that Plaintiffs were union members. Complaint, para. 38-41.

To prove misrepresentation or fraud, a plaintiff must prove that the defendant made a material misrepresentation, that the misrepresentation was false, that the defendant knew it was false or made it recklessly without any knowledge of its truth, that the defendant made it with the intention that it would be acted upon by the plaintiff, that the plaintiff acted in reliance upon it, and that the plaintiff thereby suffered injury. *Price v. Long Realty, Inc., 199 Mich. App. 461, 470, 502 N.W.2d 337, 341-42 (1993).*

The Sixth Circuit has held that fraud and misrepresentation actions stemming from CBAs are preempted. In *Terwilliger v. Greyhound Lines Inc., 882 F.2d 1033, 1037 (6th Cir. 1989), cert. denied, 495 U.S. 946, 109 L. Ed. 2d 531, 110 S. Ct. 2204 (1990),* a medically-disqualified employee had been denied **[*20]** reinstatement under a CBA-established reinstatement procedure. The plaintiff contended that the employer had committed fraud by withholding a prior medical report from an examining physician. The court held that the plaintiff essentially alleged that the employer, acting in bad faith, violated the medical examination provisions of the CBA, and that such a claim was preempted because it arose from rights created by the CBA and because the court had to interpret terms of the CBA in order to determine whether, in fact, the employer complied with them in carrying out the process of examining a reinstatement request. *Id. at 1027-38.* The court would not permit such "artful pleading" to avoid preemption under § 301. *Id.*

In *Martin v. Associated Truck Lines, Inc., 801 F.2d 246 (6th Cir. 1986),* the plaintiffs alleged that their employer made a misrepresentation when it notified them that their jobs would be eliminated and that they would be transferred or redomiciled. The employer told the plaintiffs that if they did not choose to redomicile they would be considered "voluntary quits" and would lose unemployment benefits and seniority. The plaintiffs each **[*21]** redomiciled to new areas in order to retain their seniority. They later discovered that according to the CBA, employees who refused to redomicile would be considered "laid off" rather than "voluntary quits" and would have been recalled based on senority. The court held that the plaintiffs' misrepresentation claim was preempted by § 301 because the resolution of the plaintiffs' claims depended upon the plaintiffs' true recall rights, which depended upon the CBA provisions. *Id. at 249.*

Here, Plaintiffs' fraud/misrepresentation claim depends on the existence of the CBA and the bargaining relationship it creates. Plaintiffs allege that Defendants committed fraud by representing that Plaintiffs were not union members and by failuring to disclose the existence of the CBA. This is merely "artful pleading." *Terwilliger, 882 F.2d at 1028.* The essence of Plaintiffs' allegation is that Defendants completely ignored and failed to comply with the CBA. But for the existence of the CBA, Defendants would have made no false misrepresentation, an essential element in proving fraudulent misrepresentation under Michigan law. *Price,* 461, *502 N.W.2d at 241-42.* **[*22]** As with Plaintiffs' breach of contract Claims, this fraud/misrepresentation claim depends on the existence of the CBA. Therefore, it is preempted. [3]

3 To the extent that Plaintiffs' civil conspiracy claim is derivative of the misrepresentation/fraud claim, it is also preempted.

2. *Garmon* preemption

Plaintiffs' claims that Defendants violated the Michigan whistleblowers' Protection Act, committed the tort of intentional infliction of emotional distress, and constructively discharged Plaintiffs in retaliation for exercising their rights under state and federal labor laws are all preempted under the *Garmon* rule. The *Garmon* preemption doctrine, which protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA is distinct from § 201 preemption. *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959).* Under *Garmon,* **[*23]** matters involving conduct arguably prohibited or protected by the NLRA are preempted. In *Garmon,* the Supreme Court held that:

> when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that the state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Id., 359 U.S. at 244. Nevertheless, a state may regulate conduct that is of only "peripheral concern" to the NLRA or that is "so deeply rooted in local law" that the courts should not assume that congress intended to preempt the application of state law. *Id., 259 U.S. at 242.* The critical inquiry is whether the controversy presented to the state court is identical to that which could be presented to the NLRB. *Belknap v. Hale, 463 U.S. 491, 510, 3183, 77 L. Ed. 2d 798, 103 S. Ct. 3172 (1983);*, **[*24]** *Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978).*

a. Violation of the Whistleblowers' Protection Act

According to Plaintiffs' complaint, Plaintiffs reported misconduct of Defendant employers to public authorities including, but not limited to, the National Labor Relations Board ("NLRB"), and subsequently Plaintiffs were subjected to discriminatory conduct at work including a reduction in work hours. Complaint, para. 74-76. Plaintiffs allege that Defendant employers' conduct violated the Michigan Whistleblowers' Protection Act.

The Michigan Whistleblowers' Protection Act provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, condition, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to a law of this state, a political subdivision of this state, or the United States to a public body. . . **[*25]**

Mich. Comp. Laws Ann. § 12.362 (West 1994).

Plaintiffs' Whistleblower's claim is preempted under *Garmon.* Section 8(a) (4) of the National Labor Relations Act ("NLRA") provides that "it shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act. *29 U.S.C. § 158(a)(4).* An employer is also prohibited by the NLRB from discriminating against an employee for giving sworn statements to an NLRB field examiner, even though the employee had neither "filed charges" nor "given testimony" at a hearing, *NLRB v. Scrivener, 405 U.S. 117, 31 L. Ed. 2d 79, 92 S. Ct. 798 (1972),* or for filing a claim with a state labor commission that his employer failed to pay him according to the CBA. *NLRB v. Searle Auto Glass, Inc., 762 F.2d 769, 774 n.6 (9th Cir. 1985).*

Here, Plaintiffs claim they were discriminated against because they made' reports about Defendant employers' "misconduct" to the NLRB and other undisclosed public authorities. Such reports are protected **[*26]** activity under § 7 of the NLRA, and an employer commits an unfair labor practice if it discriminates against the exercise of such protected activity. *29 U.S.C. § 158(a)(4).* Therefore, the discrimination claimed of in Plaintiffs' whistleblowers' claim is preempted under *Garmon.* [4]

4 Section 8(a) (4) does not apply to filing charges or testifying under legislation other than the NLRA. *See B & M Excavating, 155 NLRB 1152 (1965), enf'd, 368 F.2d 624 (9th Cir. 1966).* To the extent that Defendants discriminated against Plaintiffs for making reports to public bodies other than the NLRB Concerning issues unrelated to the CBA and not arguably prohibited or protected by the NLRA, Plaintiffs Whistleblowers' claim would not be preempted. Plaintiffs, however, did not specify any public bodies other than the NLRB. Complaint, para. 74-76. Therefore, Plaintiffs allegations fail to state a claim other than the NLRB, claim discussed above.

[*27] b. Intentional Infliction of Emotional Distress

Plaintiffs further allege that Defendants engaged in extreme conduct in the employment setting, including threatening or actually terminating Plaintiffs' employment and subsequently rescinding the termination, verbally abusing Plaintiffs, and ostracizing Plaintiffs, thereby causing severe emotional distress. According to Plaintiffs' complaint, this conduct occurred "subsequent to the time that the issues raised in this Complaint were brought to the attention of the Defendant Employers. . . " Complaint, para. 68.

In *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 51 L. Ed. 2d 338, 97 S. Ct. 1056 (1977)*, a union member claimed that he had been denied job referrals and subjected to a campaign of abuse and harassment by the union. The Court held that the NLRA did not preempt a state action for intentionally inflicting emotional distress, even though a major part of the cause of action consisted of conduct that was arguably an unfair labor practice.

But not all claims of intentional infliction of emotional distress escape preemption. **[*28]** For an intentional infliction of emotional distress claim to escape preemption, "it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Id. 430 U.S at 205.* An employee's tort claim is preempted if his claim relies on conduct which supports an unfair labor practice claim. *Carter v. Sheet Metal Workers' Ass'n, 724 F.2d 1472, 1476 (11th Cir.), cert. denied, 469 U.S. 831, 105 S. Ct. 119, 83 L. Ed. 2d 61 (1984).*

Here, Plaintiffs' claim of intentional infliction of emotional distress centers around conduct which took place after Plaintiffs' raised the issue of the employers' lack of compliance with CBA, and allegedly occurred "with the ultimate goal of encouraging Plaintiffs to abandon the claims raised in this Complaint." Complaint, para. 70. As discussed above, this conduct also supports an unfair labor practice charge under § 8(a)(4) and any emotional distress **[*29]** suffered by Plaintiffs is a "function of. . . (employment) discrimination itself." *Farmer, 430 U.S. at 205.* Plaintiffs' intentional infliction of emotional distress claim is therefore Preempted.

c. Constructive retaliatory discharge

Plaintiffs further allege that Defendant employers constructively discharged Plaintiffs by reducing the amount of hours worked by each Plaintiff in retaliation for Plaintiffs' refusal to forego their claims. As discussed above, such retaliatory conduct also supports an unfair labor practice charge under § 8(a)(4) and is thus preempted.

C. Failure to exhaust contractual remedies

Plaintiffs' breach of third party contract claim, which was preempted by § 201, should have been first resolved through the grievance procedures established by the collective bargaining agreement. "As a general rule in cases to which federal labor law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union as the mode of redress." *Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 13 L. Ed. 2d 580, 85 S. Ct. 614 (1965).* **[*30]** "An employee (can not sidestep the grievance machinery provided in the contract and. . . unless he attemptes) to utilize the contractual procedures for settling his dispute with his employer, his independent suit against the employer in the District Court will be dismissed." *Hines v. Anchor Motor Freight, 424 U.S. 554, 563, 47 L. Ed. 2d 231, 96 S. Ct. 1048 (1976).* This insistence on the arbitration of contract disputes is the same policy underlying § 301 preemption. *Lueck, 471 U.S. at 220* ("It is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.")

It is undisputed that the painters Union held an employee meeting October 3, 1992 at which it distributed to each employee a Copy of the 1990-92 CBA. Article XX of that agreement contains a grievance procedure. Section 1 describes a grievance as a dispute over the interpretation or application or compliance with the provisions of the agreement. Section 2 provides that if the parties are unable to resolve the grievance, they may then proceed to final and binding [*31] arbitration. Nevertheless, none of the Plaintiffs filed a grievance or requested that the Painters Union proceed to final and binding arbitration on the Defendant employers' alleged breach of the CBA.

Nor are Plaintiffs' excused from exhausting their contractual remedies by either of the two exceptions to the exhaustion requirement. *Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).* One such exception occurs "where the effort to proceed formally with contractual or administrative remedies would be wholly futile." *Glover v. St. Louis-San Francisco Railway, 393 U.S. 324, 329-30, 21 L. Ed. 2d 519, 89 S. Ct. 548 (1969).* Exhaustion may also be excused "when the conduct of the employer amounts to a repudiation of the contractual procedures." *Vaca, 386 U.S. at 185.* Such repudiation must be of the grievance procedures themselves. *Terwilliger, 882 F.2d at 1039.*

Plaintiffs cannot avail themselves of either exception. The Painters Union's lack of representation for [*32] almost four years may have rendered resort to grievance arbitration futile for that period, but the Painters Union disseminated copies of the CBA to all employees October 3, 1992, and no Plaintiff filed a grievance thereafter. Similarly, the employer's concealment of the existence of the CBA may have amounted to a repudiation of the CBA for the term of the concealment, but Plaintiffs have produced no evidence that the employers conduct amounted to a repudiation of the CBAs' grievance procedures subsequent to Plaintiffs receipt of copy of the CBA in October, 1992. Therefore, Plaintiffs' breach of contract claim is dismissed for failure to exhaust available contractual remedies.

D. Breach of the duty of fair representation

Plaintiffs' remaining contention is that the Union breached its duty of fair representation by acting fraudulently, dishonestly, and in bad faith in purporting to undertake representation of the employees and purporting to negotiate a resolution of the issue of the non-compliance with the CBA. As the exclusive bargaining representative of the employees, a union has a "statutory duty fairly to represent all of those employees, both in its collective bargaining. [*33] . . and in its enforcement of the resulting collective bargaining agreement." *Vaca, 386 U.S. at 177.* "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests Of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* A federal court must review a union's contract negotiation and resolution of labor disputes deferentially. As the Supreme Court recently stated:

> Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain reached by the union. Rather, Congress envisioned the relationship between the courts and labor union as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.

Air Line Pilots Ass'n Intern. v. O'Neill, U.S. , *111 S. Ct. 1127, 1135 (1991).* [*34] Therefore, the product of union negotiation constitutes a breach of the duty of fair representation only if it can be fairly characterized as "so far outside 'a wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" *Id. at 1136.*

It must be remembered here that Plaintiffs do not claim that the Painters Union breached its duty of fair representation in failing to represent Plaintiffs and enforce the CBAs from 1988 to October, 1992. Rather, Plaintiffs claim that the Painters Union breached its duty of fair representation in its negotiation of the settlement regarding Defendant employers' failure to comply with the 1988-90 and 1990-92 CBAs. This settlement provided to all current employees a 50 cent per hour raise and 50 cents per hour back pay for hours worked in the past six months. By a vote of 9-8, a majority of the employees voted in favor of the new contract and the

settlement proposal. Such a settlement cannot be fairly characterized as "so far outside 'a wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" *O'Neill, 111 S. Ct. at 1136*. Therefore, Defendant Painters Union **[*35]** has not breached its duty of fair representation. [5]

> 5 Defendants argue that Plaintiffs' breach of the duty of fair representation claim is foreclosed by the principle of majority rule and by Plaintiff's failure to exhaust their contractual remedies. Because this court grants the Defendants' motion for summary judgment on the grounds that the Union's conduct in reaching a settlement of this issue was not wholly irrational or arbitrary, it need not reach these arguments.

F. Union officer as Defendant

Even if the Painters Union had breached its duty of fair representation to Plaintiffs, Defendant Painters Union officer Robert Kennedy is immune from liability for breach of the duty of fair representation as well as state tort actions. Section 301(b) of the Labor Management Relations Act, *29 U.S.C. § 185(b)*, as interpreted by the courts, provides that individual union officers and members are immune from liability for breach of the duty of fair representation, *Complete Auto Transit, Inc. v. REIS, 451 U.S. 401, 68 L. Ed. 2d 248, 101 S. Ct. 1836 (1981)*, **[*36]** as well as state tort actions, *Evangelista v. Inland boatmen's Union of the Pac., 777 F.2d 1390, 1400 (9th Cir. 1985)*.

IV. Conclusion

Thus, summary judgment is hereby GRANTED in favor of Defendants, and Plaintiffs' claims are hereby dismissed.

Nancy G. Edmunds

U.S. District Judge

Dated: *SEP 26, 1994*

CHARLES ARDINGO, Plaintiff-Appellee, v. LOCAL 951, UNITED FOOD AND COMMERCIAL WORKERS UNION, Defendant-Appellant.

No. 08-1078

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

09a0383n.06; 333 Fed. Appx. 929; 2009 U.S. App. LEXIS 11694; 2009 FED App. 0383N (6th Cir.); 186 L.R.R.M. 2616

May 29, 2009, Filed

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PRIOR HISTORY: [**1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

Ardingo v. Potter, 445 F. Supp. 2d 792, 2006 U.S. Dist. LEXIS 55001 (W.D. Mich., 2006)

COUNSEL: For CHARLES ARDINGO, Plaintiff - Appellee: Joel E. Krissoff, Farr Oosterhouse & Krissoff, Grand Rapids, MI.

For LOCAL 951, UNITED FOOD & COMMERCIAL WORKERS UNION, Defendant - Appellant: Jonathan D. Karmel, Karmel & Gilden, Chicago, IL.

JUDGES: Before: KENNEDY and BATCHELDER, Circuit Judges; and THAPAR, District Judge. * Kennedy, Circuit Judge, dissenting.

* The Honorable Amul R. Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION BY: THAPAR

OPINION

[*931] **THAPAR, District Judge.** Plaintiff Charles Ardingo won a jury verdict of $ 819,614 in his wrongful-termination lawsuit against Defendant Local 951, United Food & Commercial Workers Union. On appeal, the defendant contends that the judgment in favor of Ardingo should be reversed because Ardingo's wrongful-termination claim is preempted by the Labor-Management Reporting and Disclosure Act of 1959 (the "LMRDA"). In the alternative, the defendant asks for a new trial on the grounds that: (1) the trial court made several prejudicial evidentiary errors; (2) the trial court erred in refusing to give certain jury instructions proposed by the [**2] defendant; (3) the trial court erroneously permitted the plaintiff's expert to testify; and (4) the trial court erred in not remitting the amount of damages awarded to Ardingo. Because these arguments are unavailing, we affirm.

I. Background

The defendant is a labor organization representing thousands of grocery store workers--largely Meijer

employees--in Michigan. The defendant hired Ardingo as a business agent in 1990 under a just-cause employment policy that permitted the defendant to terminate him only if he "failed to meet employment performance standards," or if his termination would further the needs of the union "as construed by the Supreme Court in *Finnegan v. Leu* and its progeny." J.A. at 440, 590-91. [1]

> 1 *Finnegan v. Leu, 456 U.S. 431, 102 S. Ct. 1867, 72 L. Ed. 2d 239 (1982)* is a Supreme Court case that discusses, in dictum, the need for unions to be able to terminate employees for political reasons. This case figures prominently in the defendant's preemption argument and is discussed at length below.

Ardingo's employment with the defendant went well for the first decade. During this time, he gained a seat on the union's executive board, *id.* at 598, and was given important assignments, like negotiating critical **[**3]** contracts with major employers. *See id.* at 592-93.

In 2001, however, his relationship with the union leaders changed for the worse. *See id.* at 596. After rumors started circulating that Ardingo was going to run a campaign against Robert Potter, the union's president, in the next election cycle, Potter and other union officials accused Ardingo of being a traitor. *See id.* at 596-99. Ardingo requested a meeting with Potter to discuss these issues, and the two met at a union office in Livonia, Michigan. *See id.* at 600. The meeting became heated, and Potter insinuated that Ardingo was a "pipeline to the Department of Labor." *Id.* at 602. Shortly thereafter, Ardingo was reassigned to a different position and told to have no contact with members of Local 951. *See id.* at 32.

In the spring of 2002, Ardingo cooperated with a Department of Labor investigation concerning financial irregularities with the defendant. *See id.* at 608, 619-20. Shortly after participating in interviews with the Department of Labor, Ardingo testified before a grand jury concerning the same issues. *See id.* at 32, 620.

Starting in early 2003, Ardingo was reassigned in rapid succession to jobs in North Carolina, Indiana, and **[**4]** Washington **[*932]** state. *See id.* at 32, 603-04. The ostensible purpose of each of these temporary assignments was to assist in union organizing campaigns in those states. Ardingo, however, claims that these assignments were a form of retaliation for his cooperation with the Government.

By the beginning of 2004, Local 951 was experiencing financial hardship due to the loss of members. It had lost a total of $ 1,282,709 over the previous two years, and it was on its way to losing $ 950,360 during 2004. *Id.* at 447. This was a significant amount of money for an organization that had an average annual income around $ 10,000,000. *See id.* As a result, the union leadership decided to pare down the number of its employees. Ardingo--who was making nearly $ 100,000 per year at that time and had less seniority than other similarly situated individuals--was chosen to be one of ten employees who were released in January of 2004. Robert Potter testified that Ardingo was selected for termination because of economic reasons and because Potter had lost confidence in Ardingo due to the fact that Ardingo had sought employment with Meijer, the largest employer of Local 951's members. *See id.* at 994-95.

Ardingo **[**5]** was told that he was being released for financial reasons, but he believed that excuse to be a ruse for retaliation since the defendant had recently hired at least one additional employee. *See id.* at 623. Therefore, on December 13, 2004, Ardingo filed this lawsuit against Potter and the union, alleging that they had: (1) violated his rights under the LMRDA, (2) forced him to pay assessments to the union in violation of the LMRDA, (3) terminated him in violation of Michigan public policy, and (4) wrongfully discharged him in violation of the union's just-cause policy. *See id.* at 23-24. Judge Richard Alan Enslen granted summary judgment in favor of the defendants on all but the wrongful-discharge claim, *see id.* at 318-29, and Potter was dismissed as a defendant shortly before the trial commenced. Thus, the only claim left for trial was the wrongful-discharge claim against the union. The parties consented to have this claim tried by Magistrate Judge Ellen S. Carmody.

On July 6, 2007, three days before the trial began, Ardingo supplemented his previous expert disclosures by submitting to the defendant an updated report from Dr. Marvin DeVries, the expert who ultimately testified about the **[**6]** financial damages that Ardingo had suffered. The defendant filed a motion in limine to exclude this supplemental report, and the trial court granted that motion. *Id.* at 527-28.

The trial began on July 9, 2007, and lasted for five days. In his opening statement, Ardingo's counsel told the jury that the evidence would show that Ardingo was not terminated for just cause. The defendant's counsel, on the

other hand, told the jury that the evidence would show that Ardingo was terminated out of economic necessity, which amounted to just cause. *See id.* at 569. Following the opening arguments, Ardingo proceeded to present evidence showing that he had been terminated not out of economic necessity, but out of retaliation for his cooperation with the Government and his testimony before a grand jury. Conversely, the defendant introduced evidence to support its theory that Ardingo had been terminated because of economic necessity. *See id.* at 666-67, 978-92. Particularly, the defendant argued that its shrinking membership required it to cut costs by reducing the number of its employees. The defendant maintained its economic-necessity theory **[*933]** all the way through to the closing arguments. *See, e.g., id.* at 1194. **[**7]** The jury, however, apparently did not buy into the defendant's theory and therefore returned a verdict in favor of Ardingo.

The judgment in favor of Ardingo is now on appeal before this court. In particular, the defendant argues that the judgment should be reversed because Ardingo's claim is preempted by the LMRDA, and in the alternative, the defendant argues that the judgment should be reversed because the trial court erred by: (1) admitting evidence pertaining to the alleged retaliation against Ardingo; (2) rejecting the defendant's proposed jury instructions with respect to the significance of *Finnegan v. Leu,* the burden of proof in wrongful-discharge cases, and the possibility of reinstatement in lieu of front-pay damages; (3) permitting Ardingo's expert to testify; and (4) refusing to remit the jury verdict.

II. LMRDA Preemption

A federal law may preempt a state law cause of action either expressly or impliedly. *See State Farm Bank v. Reardon, 539 F.3d 336, 341 (6th Cir. 2008)* (citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)).* A state law cause of action will be expressly preempted where a federal statute or regulation contains express language **[**8]** indicating that such lawsuits are preempted. *See id. at 341-42* (citing *Fidelity Fed. Sav. & Loan Ass'n, 458 U.S. at 153*). Implied preemption, on the other hand, exists where there is either "field preemption" or "conflict preemption." *Id. at 342* (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)).* Field preemption is found "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* (quoting *Gade, 505 U.S. at 98*). Conflict preemption refers to situations "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Gade, 505 U.S. at 98*). None of these types of preemption, however, apply to Ardingo's wrongful-discharge claim. This is not surprising considering that the Sixth Circuit has previously stated that "the preemptive scope of the LMRDA is narrow." *Davis v. UAW, 392 F.3d 834, 839 (6th Cir. 2004), overruled on other grounds by Blackburn v. Oaktree Cap. Mgmt., LLC, 511 F.3d 633 (6th Cir. 2008).*

First, Ardingo's **[**9]** claim is not expressly preempted because *29 U.S.C. § 483*, the express preemption provision in the LMRDA, does not apply to state-law wrongful-discharge claims. Instead, it only applies to state-law challenges to union elections. *Id.* As Ardingo's claim is clearly not a state-law challenge to a union election, it does not succumb to express preemption.

Nor does Ardingo's claim fall prey to field preemption. It is true that LMRDA regulates relationships between union leaders and their subordinates by preventing rank-and-file union members from being disciplined for exercising certain rights such as the right to vote in union elections and the right to speak and assemble. *See Finnegan v. Leu, 456 U.S. 431, 436-37, 102 S. Ct. 1867, 72 L. Ed. 2d 239 (1982).* However, the LMRDA clearly does not occupy the entire field of regulation with respect to union employees because it contains a **[*934]** savings clause that provides that "except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or the law of any State." *29 U.S.C. § 523(a).* Thus, the savings clause makes it clear that the LMRDA does not occupy **[**10]** the field of regulation with respect to the relationships between union leaders and subordinates so thoroughly that union employees cannot enter into and enforce just-cause employment contracts under state law.

Furthermore, there is no conflict preemption here because it is not physically impossible to comply simultaneously with both the LMRDA and the state law

pertaining to wrongful discharge. The LMRDA restricts union officials from retaliating against union members for exercising political rights such as their right to free speech. It is not physically impossible to comply with these restrictions while simultaneously complying with state wrongful-discharge law. Moreover, there is no conflict preemption because Ardingo's lawsuit does not pose an obstacle to the LMRDA's purposes and objectives. The LMRDA's "overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Finnegan, 456 U.S. at 441* (citing *Wirtz v. Hotel Employees, 391 U.S. 492, 497, 88 S. Ct. 1743, 20 L. Ed. 2d 763 (1968))*. There is no danger that this objective will be interfered with by a lawsuit that seeks to vindicate an employee's rights **[**11]** under a just-cause employment contract.

The defendant, however, suggests that conflict preemption does apply in this instance. According to the defendant, the Supreme Court's decision in *Finnegan* construed the LMRDA in a way that requires a finding of preemption in this case. Essentially, the defendant argues that the LMRDA, as interpreted in *Finnegan,* provides union officials with an affirmative right to exercise unfettered discretion in union employment matters. The defendant's reliance on *Finnegan,* however, suffers from two fatal defects. First, *Finnegan* is inapposite to the case at hand. Second, the defendant misinterprets *Finnegan.* To see why this is so, it will be helpful to review *Finnegan.*

The petitioners in *Finnegan* were union members who--just like the plaintiff in this case--had been employed by their union as business agents. *Id. at 433.* Unlike the plaintiff in this case, however, the petitioners in *Finnegan* were not suing for wrongful discharge in violation of a just-cause employment contract. Instead, each of the petitioners was claiming that his termination was a violation of the LMRDA. *Id. at 434.* The *Finnegan* petitioners' claims arose out of an election for the presidency **[**12]** of Local 20 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *See id. at 433-34.* After the election, the newly elected president fired the petitioners because they had supported his opponent. *See id.* The petitioners then sued the new president on the ground that he had violated their rights under the LMRDA. *See id. at 434.* The question presented to the Supreme Court was "whether the discharge of a union's appointed business agents by the union president, following his election over the candidate supported by the business agents, violated the Labor-Management Reporting and Disclosure Act of 1959." *Id. at 432.*

[*935] In addressing that question, the Supreme Court first engaged in a discussion of the background and purposes of the LMRDA. The Court observed that the statute "was the product of congressional concern with widespread abuses of power by union leadership," *id. at 435*, and the Court further noted that the statute was intended to ensure "that unions would be democratically governed and responsive to the will of their memberships." *Id. at 436.* To this end, the LMRDA granted rights to union members "paralleling certain rights guaranteed by **[**13]** the Federal Constitution." *Id.* Specifically, the LMRDA sought to ensure that union members would be able to exercise their rights "to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in turn loss of livelihood." *Id. at 435-36.* Against this backdrop, the Supreme Court concluded that the LMRDA was intended to protect "rank-and-file union members--not union officers or employees." *Id. at 437.* Thus, it was clear that the LMRDA would have protected the petitioners if they had been punished in their capacity as union members. However, they were not punished in that capacity. Instead, the union president only exacted retribution against them in their capacity as union employees.

After discussing the background of the LMRDA, the Court turned its attention to the question of whether the LMRDA protected the petitioners from political retribution in their capacities as union employees as well as in their capacities as union members. First, the Court rejected the petitioners' claims that the union president's actions violated § 609 of the LMRDA (codified at *29 U.S.C. § 529*), which makes it unlawful for a union officer **[**14]** to "fine, suspend, expel or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of [the LMRDA]." According to the petitioners, their termination as business agents was an act of discipline that violated § 609. The Supreme Court, however, concluded that § 609 did not provide the petitioners with a cause of action because § 609 only applies to "punitive actions diminishing membership rights, and not to termination of a member's status as an appointed union employee." *Finnegan, 456 U.S. at 438.* Next, the Court

rejected the petitioners' attempts to establish a cause of action under § 102 of the LMRDA (codified at *29 U.S.C. § 412*), which allows a person to sue in a district court of the United States if that person's rights under the LMRDA have been infringed. The Court held that the petitioners could not sue under *§ 102* because their rights under the LMRDA had not been infringed. *See Finnegan, 456 U.S. at 440-42*. In particular, the Court stated that:

> [The LMRDA] does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own. Indeed, neither the language nor the legislative history **[**15]** of the Act suggests that it was intended even to address the issue of union patronage. To the contrary, the Act's overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections. Far from being inconsistent with this purpose, the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election.

[*936] *Id. at 441* (citation and footnotes omitted). Therefore, the Supreme Court affirmed the summary judgment that had been entered in favor of the union. *See id. at 442*. Considering that the Court had already found that the statute was intended to protect union members instead of union employees, it is not surprising that the Court held that the LMRDA provided no protection for the petitioners.

The most glaringly obvious defect in the defendant's reliance on *Finnegan* is that *Finnegan* is inapposite to the case at hand. *Finnegan* simply held that the petitioners in that case did not have a cause of action under the LMRDA because the protections of the LMRDA do not apply to union employees **[**16]** who have been terminated for political reasons. This holding has nothing to do with the instant case because Ardingo is not asserting a cause of action under the LMRDA. Instead, he is suing to enforce his state-law contract rights under his just-cause employment contract, and these contract rights simply are not impacted by *Finnegan*. It would be a non-sequitur to say that Ardingo is precluded from bringing a lawsuit to enforce his contract rights simply because the LMRDA does not provide him with a cause of action against the defendant. Indeed, there are many federal laws that do not provide Ardingo with a cause of action, but that does not mean that each one of them preempts his wrongful-discharge lawsuit. In short, when a union chooses to offer a just-cause employment contract to an employee, there is nothing in *Finnegan* or the LMRDA that would prevent that contract from being enforced.

The defendant erroneously believes that *Finnegan* is relevant to this case because the defendant misinterprets *Finnegan* as standing for the proposition that the LMRDA gives union officials unfettered discretion in employment matters. The holding of *Finnegan*, however, clearly does not support this interpretation. **[**17]** The fact that the LMRDA does not provide a cause of action to union employees who have been fired for political reasons does not mean that state law could never restrict a union leader's discretion to terminate a union employee. *See Bloom v. Gen. Truck Drivers, Office, Food & Warehouse Union, Local 952, 783 F.2d 1356, 1360-62 (9th Cir. 1986)* (holding that a wrongful-discharge lawsuit was not preempted by the LMRDA where a business agent claimed to have been terminated for refusing to violate state law). Such a question was not even before the *Finnegan* Court. Therefore, it would be wrong to say that *Finnegan* stands for the proposition that the LMRDA gives union officials unlimited discretion in employment matters.

Finally, it is true that the defendant's just-cause policy allows employees to be terminated for political reasons along the lines discussed in *Finnegan*, but this is not a basis for finding preemption. Instead, this fact is only relevant to the issue of whether Ardingo's termination was a violation of the just-cause policy. The question of whether Ardingo was fired for just cause was a matter for the jury to decide, and the sufficiency of the evidence has not been challenged **[**18]** on appeal.

III. Evidentiary Objections

At trial, Ardingo presented evidence that he had cooperated with a Department of Labor investigation and had testified before a grand jury, and he also presented evidence indicating that he was terminated in retaliation for these acts rather than for any just cause. The defendant **[*937]** objects to the admissibility of this evidence on the ground that it was irrelevant and

prejudicial. This argument, however, lacks merit. All relevant evidence is admissible, *Fed. R. Evid. 402*, and relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," *Fed. R. Evid. 401*. In this case, the issue before the jury was whether Ardingo was terminated in violation of the defendant's just-cause policy. Thus, the reason for Ardingo's termination was a fact that was of consequence to the determination of the action. As result, any evidence bearing on the reason for Ardingo's termination would have been relevant and therefore generally admissible. Because the evidence of retaliation undeniably had some bearing on the **[**19]** reason for Ardingo's termination, it was relevant and admissible.

The evidence was also relevant and admissible because it rebutted the union's defense that Ardingo was terminated out of economic necessity. Under Michigan law, economic necessity can constitute just cause for discharging an employee, *see Ewers v. Stroh Brewery Co., 178 Mich. App. 371, 443 N.W.2d 504 (Mich. Ct. App. 1989)*, but economic necessity cannot be used as a pretext "for discharges which would otherwise be subject to just-cause attack by the employee." *Id. at 507*. Therefore, Ardingo was entitled to present evidence showing that the purported economic necessity was just a pretext for termination without cause.

The defendant, however, contends that the evidence pertaining to retaliatory discharge was irrelevant and inadmissible because it had no bearing on the issue before the jury. According to the defendant, the only issue properly before the jury was the question of whether the defendant was in such dire financial straights that it terminated Ardingo out of economic necessity. Therefore, the defendant contends that the only evidence that was admissible at trial was evidence pertaining to the its financial circumstances. The defendant **[**20]** bases this argument on Judge Enslen's opinion denying the defendant's motion for summary judgment on the wrongful-discharge claim. From the defendant's viewpoint, Judge Enslen's opinion had the effect of definitively establishing that the only issue to be decided by the jury was the question of whether the defendant actually had an economic need to terminate Ardingo. Thus, according to the defendant, Ardingo was limited to presenting evidence on only that issue. This argument, however, is plainly wrong because it relies on a gross misreading of Judge Enslen's opinion. In denying the defendant's motion for summary judgment, Judge Enslen clearly did not limit the issues to be decided by the jury. *See* J.A. at 327-28. Instead, he simply found that the claim must be decided by a jury because the defendant's two defenses to this claim did not demonstrate that the defendant was entitled to judgment as a matter of law. *See id.* Rather than intending to limit the issues, Judge Enlsen was simply responding to the two specific arguments raised by the defendant: (1) Ardingo was not terminated, but was merely laid off; and (2) Ardingo's layoff/termination was due to economic necessity. Judge Enslen **[**21]** found that there were genuine issues of material fact with respect to these defenses, but he did not hold that these were the *only* issues on which there were genuine issues of material fact. *See* J.A. at 327-28. A contrary holding would not only be factually wrong, but it **[*938]** would produce the absurd result of allowing a defendant to limit a plaintiff's evidence according to the issues that the defendant chose to raise in its motion for summary judgment.

The defendant also argues that the trial court should have excluded the retaliatory discharge evidence under *Fed. R. Evid. 403* because that evidence was unfairly prejudicial. *Rule 403* allows relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Within the context of *Rule 403*, '[u]nfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather, it refers to evidence which tends to suggest [a] decision on an improper basis.'" *United States v. Lawson, 535 F.3d 434, 442 (6th Cir. 2008)* **[**22]** (quoting *United States v. Newsom, 452 F.3d 593, 603 (6th Cir. 2006)*). The evidence at issue here does not suggest a decision on an improper basis. Indeed, the trial court took appropriate measures to ensure that would not happen by preventing Ardingo and his witnesses from testifying about the substance of either the Government's investigation or the grand jury proceedings. *See, e.g.*, J.A. at 35-36, 725-26. Ardingo was permitted to reveal nothing other than the fact that there had been a Government investigation with which he cooperated, that there had been a grand jury proceeding before which he testified, and that union officials reacted to these actions with hostility. *See id.* at 35-36. As this evidence was necessary for the presentation of Ardingo's

theory of the case, and did not suggest a decision on an improper basis, it cannot be said that the trial court abused its discretion in admitting the evidence. *See United States v. Goosby, 523 F.3d 632, 638 (6th Cir. 2008)* (stating that evidentiary rulings are reviewed for abuse of discretion).

Finally, the defendant also asserts that the evidence of Ardingo's cooperation with the Government and testimony before a grand jury was not **[**23]** admissible because those acts were too temporally remote from his discharge to prove that the discharge was in retaliation for those acts. This argument, however, is misdirected. The lack of temporal proximity between Ardingo's termination and his cooperation with the Government and testimony before a grand jury might be valid basis for finding that the defendant was entitled to judgment as a matter of law, *see Aho v. Dep't of Corr., 263 Mich. App. 281, 688 N.W.2d 104, 110 (Mich. Ct. App. 2004)*, but it is not a valid basis for finding that the evidence of retaliation should have been excluded at trial. All that *Rule 401* requires is that the evidence make Ardingo's case somewhat more or less likely, and there can be no doubt that the evidence at issue here had the effect of making his case somewhat more likely. The fact that the evidence may not have been enough to make Ardingo's claim more likely than not does not mean that it was irrelevant. In other words, the fact that a plaintiff's evidence fails to make the plaintiff's case likely enough for the plaintiff to win does not mean that the evidence fails to make the plaintiff's case more likely than it would have been without the evidence.

IV. Jury **[**24]** Instructions

A trial court's refusal to give a requested jury instruction is reviewed for abuse of discretion, and it constitutes reversible error if "(1) the omitted instruction is a correct statement of law, (2) the instruction **[*939]** is not substantially covered by other delivered charges, and (3) the failure to give the instruction impairs the requesting party's theory of the case." *Tompkin v. Philip Morris USA, Inc., 362 F.3d 882, 901 (6th Cir. 2004)* (quoting *Hisrich v. Volvo Cars of N. Am., Inc., 226 F.3d 445, 449 (6th Cir. 2000)*). "A judgment may be reversed only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* (quoting *Hisrich, 226 F.3d at 449*). The defendant contends that the trial court committed reversible error by refusing to give the defendant's requested instructions with respect to: (1) the union president's right to terminate union employees for political reasons pursuant to *Finnegan;* (2) the burden of proof for a wrongful-discharge claim; and (3) the possibility that Ardingo could be reinstated rather than awarded front pay. However, because the district court's refusal to give these instructions was not an abuse of discretion, this **[**25]** court will not disturb the jury's verdict.

A. The Defendant's Proposed *Finnegan* Instruction

The defendant requested that the trial court instruct the jury that because the just-cause policy incorporated *Finnegan,* it allowed employees to be terminated for political reasons. *See* J.A. at 342. The trial court provided such an instruction during trial, but declined to so instruct the jury at the close of evidence because the defendant had built its case around the theory that Ardingo was terminated for economic reasons, not political reasons. *See id.* at 39. Therefore, the trial court concluded that giving this instruction would only serve to confuse the jury. *See id.* While the trial court could have reminded the jury of its previous instruction at the close of evidence--and that may have even been preferable--the trial court did not abuse its discretion in refusing to give the instruction a second time, especially where it did not impair the defendant's theory of the case in any way. *See Tompkin, 362 F.3d at 901* (quoting *Hisrich, 226 F.3d at 449*).

The defendant's sole defense from the beginning to the end of this case was that Ardingo was terminated for economic reasons. The defendant's counsel **[**26]** clearly established this as the defendant's theory of the case when he announced in his opening statement that "We claim [Ardingo] was laid off due to economic and financial circumstances," J.A. at 569. The defendant's counsel continued to advance this theme throughout the trial and, to a large extent, focused its cross examinations and the testimony of its own witnesses on the issue of its economic circumstances. *See, e.g., id.* at 666-67, 978-92. Thus, it is clear that the defendant's theory of the case was that Ardingo was terminated because of economic necessity. As a result, the trial court did not impair the defendant's theory of the case by refusing to instruct the jury a second time that a union employee could be fired for political reasons. Accordingly, the refusal to give the defendant's requested *Finnegan* instruction did not impair the defendant's theory of the case and therefore cannot constitute reversible error. *See Tompkin, 362 F.3d at 901*

(quoting *Hisrich, 226 F.3d at 449*).

Moreover, the refusal to give the requested *Finnegan* instruction at the close of evidence did not render the jury instructions confusing or misleading with respect to the contours of the defendant's **[**27]** just-cause policy. To say otherwise would ignore the fact that the entire just-cause policy was admitted into evidence, J.A. 436-41, as well as the fact that the jury **[*940]** actually was instructed on the meaning of *Finnegan* and *Finnegan's* significance within the just-cause policy, *id.* at 1006. The trial court's instruction on the meaning and significance of *Finnegan* occurred during Robert Potter's testimony on behalf of the defendant. Potter had been asked by the defendant's counsel to explain the defendant's just-cause policy to the jury, *id.* at 997-98, but when he started to explain the meaning of *Finnegan*, the judge immediately stopped him, *id.*, which was appropriate in light of the fact that witnesses are not allowed to explain the applicable law to the jury, *see United States v. Safa, 484 F.3d 818, 821 (6th Cir. 2007)*. In lieu of allowing Mr. Potter to testify on that issue, the trial court instructed the jurors on the meaning of *Finnegan* and further instructed them that the just-cause policy allowed employees to be fired for political reasons because it incorporated *Finnegan*. *See* J.A. at 1006. The jurors presumably remembered this instruction when it came time for their deliberations, **[**28]** and the defendant has not presented any evidence that they failed to understand the instruction when given. *See Girtman v. Lockhart, 942 F.2d 468, 474 (8th Cir. 1991)* (holding that defense attorney's failure to object to prosecutor's misstatement of the burden of proof during closing argument was not ineffective assistance of counsel since the jury was presumably capable of remembering the judge's instructions regardless of when those instructions were given). Given this presumption, and the fact that the jurors had the just-cause policy available to them as an exhibit, this court can only conclude that the final jury instructions did not confuse or mislead the jurors about what did and did not constitute just cause under the defendant's policy. As a result, it cannot be said that the trial court's refusal to give the requested *Finnegan* instruction prejudiced the defendant since it neither impaired the defendant's theory of the case nor confused or misled the jurors. Moreover, the defendant has not presented any evidence that the jury was in fact confused or the trial court's decision not to reiterate this instruction at closing left the jury with a misunderstanding of the law.

Having **[**29]** failed to present any such evidence of jury confusion, the defendant argues that the trial court's refusal to give the requested *Finnegan* instruction prevented it from fully developing its theory of the case. The defendant readily admits that it did not set forth the theory that Ardingo was fired for political reasons, but it claims that this fact should not have stopped the trial court from delivering the proposed instruction because it was the trial court's fault that the defendant did not argue that Ardingo was terminated for political reasons. According to the defendant, it was not able to make the argument because the trial court prevented Robert Potter from testifying about the meaning of *Finnegan*. This argument is not compelling for two reasons. First, the defendant staked out its theory of the case in its opening statement, long before Potter ever took the stand. Second, the trial court's refusal to permit Potter from testifying about the meaning of *Finnegan* was proper as discussed above and did not in any way prevent the defendant from arguing or presenting evidence that Ardingo was fired for political reasons. To the contrary, the defendant's failure to offer such proof was **[**30]** simply the result of its own strategic decision to focus on the economic, rather than political, reasons for terminating Ardingo.

The defendant also argues that the failure to provide the requested *Finnegan* **[*941]** instruction at the close of evidence prevented the jury from properly evaluating whether Ardingo had proven that he was terminated without just cause. This argument, however, reverses the applicable burden of proof. Under Michigan law, a wrongful-discharge plaintiff does not have to disprove every potential basis for just cause. Instead, a wrongful-discharge plaintiff must prove nothing more than that: (1) he was terminated by the defendant; (2) he was performing the duties of his employment until the time of his termination; and (3) he suffered economic damages as a result of the termination. *See Rasch v. City of E. Jordan, 141 Mich. App. 336, 367 N.W.2d 856, 858 (Mich. Ct. App. 1985)*. When these prima facie elements are satisfied, the burden shifts to the defendant to prove a basis for just cause. *See id.* If the defendant demonstrates that it had just cause to terminate the plaintiff, then the burden shifts back to the plaintiff to show that the reason set forth by the defendant was merely a pretext **[**31]** for terminating the plaintiff for a reason that did not constitute just cause. *See Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880, 896 (Mich. 1980)*; *Ewers v. Stroh Brewery Co., 178 Mich. App. 371, 443 N.W.2d 504, 507 (Mich. Ct. App. 1989)*.

Thus, in light of this burden shifting analysis, it is clear that the only grounds for just cause that matter--at least as far as the jury is concerned--are those set forth by the defendant as the purported reasons for the termination. Here, the defendant clearly attempted to satisfy its burden of proving just cause by showing that Ardingo was terminated solely for economic reasons. Since the defendant never set forth the theory that Ardingo was terminated in whole or in part for political reasons, a second *Finnegan* instruction was not necessary.

B. The Defendant's Proposed Wrongful-Discharge Burden-of-Proof Instruction

The defendant proposed a wrongful-discharge burden-of-proof instruction that was substantially similar to the one the trial court provided. They both set forth the burden shifting analysis that is required for wrongful-termination claims under Michigan law, and they each instructed the jurors that they were not to substitute their own business **[**32]** judgment for that the of the defendant. The primary difference between the two instructions was that the defendant's proposed instruction provided additional direction on the issue of pretext. With respect to pretext, the instruction given to the jury simply said that the jurors should find for Ardingo if they concluded that the defendant's purported basis for just cause--i.e., economic necessity--was not the real reason that Ardingo was fired. The instruction requested by the defendant, however, added that the jurors could not find economic necessity to be a pretextual reason for Ardingo's termination if the defendant held an honest--albeit incorrect--belief that there was an economic need to terminate him.

The defendant's requested instruction is compelling at first glance, but upon deeper analysis, it becomes clear that it is an incorrect statement of law because it is logically inconsistent with the rest of the wrongful-discharge instructions. Under Michigan law, the question of pretext does not arise until the defendant has demonstrated that there was just cause for the termination at issue. *See Toussaint, 292 N.W.2d at 896*; *Ewers, 443 N.W.2d at 507*. Since the purported basis for **[**33]** just cause was economic necessity in this case, that means that the jury could not have considered **[*942]** the issue of pretext unless it had first determined that the defendant had an economic need to terminate Ardingo. Herein lies the problem with the defendant's requested instruction; if the jury has already determined that an economic necessity exists, then it makes no sense to ask whether the defendant had an honest but incorrect belief in the existence of an economic necessity. A finding of economic necessity necessarily precludes a finding that the defendant had an honest but incorrect belief in the existence of an economic necessity because the two findings are manifestly inconsistent. In other words, if an economic necessity existed, then the defendant could not have had an incorrect belief that an economic necessity existed. Nevertheless, this is what the defendant's requested instruction invited the jury to find. In light of the logical inconsistency presented by that instruction, it is clear that the instruction was not an accurate statement of the law. Therefore, the trial court was correct to reject the instruction. *See Tompkin, 362 F.3d at 901* (quoting *Hisrich, 226 F.3d at 449*).

C. **[**34]** The Defendant's Proposed Instruction on Front Pay and Reinstatement

The defendant requested that the jury be instructed that it should not award "front pay" damages if it determined that reinstatement of Ardingo to his previous job was possible. The trial court rejected this instruction because it concluded that reinstatement was not a feasible remedy. In evaluating the propriety of this refusal, one must keep in mind that the court--not the jury--orders reinstatement. It is the jury's job to determine the damages suffered by the plaintiff, and then the trial court has the discretion to order reinstatement in lieu of front pay if it finds reinstatement to be a more appropriate remedy. *See, e.g., Davis v. Combustion Eng'g, 742 F.2d 916, 922 n.5 (6th Cir. 1984)*; *see also Stafford v. Elec. Data Sys. Corp., 741 F. Supp. 664, 665 (E.D. Mich. 1990)* (holding that the availability or propriety of reinstatement is a matter for the court to decide because reinstatement is an equitable remedy). Therefore, it is not the jury's place to decide that the availability of reinstatement precludes the award of front pay damages. Here, the trial court appropriately determined that reinstatement was not **[**35]** a viable remedy since Ardingo had found another job and relocated to Washington state. *See Roush v. KFC Nat'l Mgmt. Co., 10 F.3d 392, 398 (6th Cir. 1993)* (stating that reinstatement is not appropriate "where the plaintiff has found other work" (citing *Henry v. Lennox Indus., 768 F.2d 746, 753 (6th Cir. 1985)*)). Accordingly, the trial court did not abuse its discretion in refusing to instruct the jury on the possibility of reinstatement.

V. The Plaintiff's Expert Witness

The defendant argues that the trial court erred by permitting the plaintiff's expert witness, Dr. Marvin DeVries, to testify. According to the defendant, Dr. DeVries should not have been allowed to testify because his final expert report was not disclosed in a timely fashion. The problem with this argument, however, is that the defendant did not object to Dr. DeVries' testimony at the time of trial. It is true that the defendant filed a motion in limine to exclude the final expert report, but that motion did not request that Dr. DeVries be prohibited from testifying. However, when the trial court heard oral argument on this motion, the defendant's counsel did suggest that the court should exclude Dr. DeVries' testimony **[**36]** as well as his report. The trial court agreed to exclude **[*943]** the report, but it explicitly deferred ruling on the admissibility of the testimony. With respect to the admissibility of Dr. DeVries' testimony, the trial court stated, "I am going to take up your motion in the context of objections to Mr. [sic] DeVries' testimony at the time he testifies," J.A. at 527, and "So that's my ruling, and I will take up any specific objections you have to his testimony at the time of his testimony," *id.* at 528. Since those statements did not amount to an explicit and definitive ruling as to the admissibility of Dr. DeVries' testimony, the defendant was required to contemporaneously object to the testimony at trial in order to preserve the issue of its admissibility for appeal. *See Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 791-92 (6th Cir. 2002)* (citing *United States v. Brawner, 173 F.3d 966, 970 (6th Cir. 1999)).* When Dr. DeVries took the stand to testify at the trial, however, the defendant failed to make any objections. Indeed, not only did the defendant's counsel fail to object, but he affirmatively consented to Dr. DeVries' expert testimony; when the plaintiff's counsel moved the court **[**37]** to accept Dr. DeVries as an expert witness in this case, the defendant's counsel responded, "No objection, your Honor." In light of the defendant's failure to make a contemporaneous objection to the testimony, the defendant cannot now claim that the admission of Dr. DeVries testimony was error. *See id.; see also Fed. R. Evid. 103(a)(1)* ("Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record . . . .").

VI. Remittitur

This court reviews a refusal to remit a verdict for abuse of discretion. *See Denhof v. City of Grand Rapids, 494 F.3d 534, 548 (6th Cir. 2007).* A trial court should not remit a verdict "unless it is (1) beyond the range supportable by proof; or (2) so excessive as to shock the conscience; or (3) the result of a mistake." *Gregory v. Shelby County, Tenn., 220 F.3d 433, 443 (6th Cir. 2000)* (citing *Bickel v. Korean Air Lines Co., Ltd., 96 F.3d 151, 156 (6th Cir. 1996)).* None of these situations exist in the case at hand. First, given that Ardingo's economic expert testified that Ardingo had suffered a total economic loss of $ 943,479, J.A. at **[**38]** 818-19, the jury verdict of $ 819,614 is well within the range supportable by proof. Second, the jury's award may be somewhat excessive, but it is not so high as to shock the conscience. The trial court reached this same conclusion, and the trial court's decision in this regard is entitled to substantial deference because "the excessiveness of the verdict is primarily a 'matter . . . for the trial court which has the benefit of hearing the testimony and of observing the demeanor of the witnesses." *Slayton v. Ohio Dep't of Youth Servs., 206 F.3d 669, 679 (6th Cir. 2000)* (quoting *Wilmington v. J.I. Case Co., 793 F.2d 909, 922 (8th Cir. 1986)); see also Champion v. Outlook Nashville, Inc., 380 F.3d 893, 905 (6th Cir. 2004)* ("We undertake a highly deferential review of the district court, which itself is sharply limited in its ability to remit a jury verdict."). The defendant's arguments in favor of remittitur do little more than emphasize the uncertain and speculative nature of Ardingo's damages, a fact that is almost certainly present to some degree in any case where front pay damages are available. Those arguments simply do not overcome the high degree of deference that is owed to the **[**39]** trial court's ruling, and therefore, this court will not second guess the trial court's conclusion that the jury award is **[*944]** not shocking to the conscience. Finally, there is no indication that the verdict was the result of mistake. To the contrary, the jury was given a clear picture of the extent of Ardingo's economic loss by the testimony of his expert witness and the defendant's effective cross examination of that witness. Thus, the jury's award must be upheld because it is not beyond the range supportable by proof, is not so excessive as to shock the conscience, and is not the result of a mistake. *See Gregory, 220 F.3d at 443.*

VII. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

DISSENT BY: Kennedy

DISSENT

Kennedy, Circuit Judge, dissenting.

Jury instructions exist to submit the case's issues to the jury so that it can decide the case in accordance with the applicable law. *See Morgan v. N.Y. Life Ins. Co., 559 F.3d 425, 434 (6th Cir. 2009).* The Union employment policy here stated that it could terminate an employee for "fail[ure] to meet employment performance standards" or if "[t]he Union's needs will be furthered by said termination, particularly as construed by the Supreme **[**40]** Court in *Finnegan v. Leu* and its progeny." Ample evidence existed in the record for the jury to draw the conclusion that the Union terminated Ardingo in accordance with *Finnegan.* I conclude that the district court should have instructed the jury on the employment policy's *Finnegan* clause, as the Union requested, and for that reason, I respectfully dissent.

I.

In *Finnegan,* the Supreme Court held that former union employees employed by the union lacked a cause of action against their union under the LMRDA for terminations based on political opposition. *456 U.S. at 441-42* (reasoning, in part, that the LMRDA assures "the ability of an elected union president to select his own administrators [as] an integral part of ensuring a union administration's responsiveness to the mandate of the union election"). In view of the above, *Finnegan* occupies a central role in this appeal. Its scope is a question of federal statutory interpretation with regard to the LMRDA and the preemption question, and a question of state law as to the contractual provision's effect. I question the majority's determination that the LMRDA does not preempt this action based in state law. Preemption protects the "uniform **[**41]** national labor relations policy" enacted in the LMRDA. *See Vandeventer v. Local Union No. 513 of the Int'l Union of Operating Eng'rs, 579 F.2d 1373, 1377-78 (8th Cir. 1978).* However, I need not decide the question, because even if I accept the majority's preemption argument and its concomitant interpretation of *Finnegan,* the Union nevertheless deserved a jury instruction on it under its employment policy.

II.

I agree with the majority's characterization of the applicable law as to Ardingo's underlying claim. *See* Maj. Op. at 18. The plaintiff has the burden of proving that he was living up to the contract and the terms of employment up to his termination. The burden then shifts to the defendant to show that the termination was legal. If the defendant makes this showing, the burden shifts back to the plaintiff to show that the proffered reason was mere pretext. Over the course of **[*945]** trial, the Union argued that it did not terminate Ardingo–it laid him off, and should the jury conclude that it did terminate Ardingo, economic necessity motivated the termination. Ardingo offered evidence that the Union terminated him; also, Ardingo presented two alternative, individually sufficient theories **[**42]** in response to Ardingo's purported termination for economic necessity: (1) the Union did not face financial circumstances necessitating a reduction in workforce; and (2) the Union fired him in retaliation for his participation in the Department of Labor investigation, as part of suspicion that he planned to run against Potter, and for political opposition generally. Ardingo's own testimony provided much of the evidence for the Union's requested jury instruction.

In *Harvey v. Hollenback, 113 F.3d 639 (6th Cir. 1997),* we explained that, "[i]n *Finnegan,* a newly elected union leader was able to fire appointed union officials who had campaigned against him because ultimately, he was expressing the will of the majority by selecting a staff that shared his views and could be trusted to faithfully execute and implement his policies." *Id. at 643.* A jury could have narrowly construed Ardingo's retaliation theory as termination for lack of political accord with the Union administration. Rumors had swirled around the Union in early- to mid-2001 that Ardingo intended to run against Potter for President in the upcoming election, which built up animosity against Ardingo within Potter's administration. **[**43]** Later, Potter and his administration perceived that Potter volunteered information to the Department of Labor to undermine them politically. The jury might have concluded that the Union terminated Potter because he could not be trusted to faithfully execute Potter's policies to further the Union's needs.

Without a jury instruction on the meaning of *Finnegan,* the district court did not make the jury aware of the legality of this articulated ground for Ardingo's termination. Put differently, the district court did not adequately describe the case's applicable law to the jury

such that it could come to an accurate verdict after applying its findings of fact to said applicable law.

III.

The majority is correct in pointing out that the Union largely relied upon economic necessity as the legal ground for Ardingo's termination. Maj. Op. at 16. I do not dispute that as a strategic matter, the Union appeared to have determined that presenting an extensive case on characterizing Ardingo's termination as political would weaken its primary defense that economic necessity motivated the firing. Nevertheless, the majority does not deny that the Union sought testimony from Potter on the meaning of the **[**44]** employment policy's *Finnegan* clause so as to get that issue before the jury. *Id.* at 16-17. It even does not deny that this represented an attempt by the Union to argue that the employment policy made legal a certain type of termination for political opposition. To the contrary, Ardingo himself presented ample evidence that the Union terminated him for political opposition upon which the jury could have concluded in the Union's favor on this ground.

In actual practice, a party's theory of the case is not monolithic. This case was complex and took nearly a week to try. As a matter of strategy, the Union intoned loudly its economic necessity argument while whispering its political opposition theory. That fact alone does not eviscerate the Union's right under the policy to terminate Ardingo in accordance with *Finnegan,* **[*946]** nor its concomitant right to have the jury decide the case in accordance with the applicable law. *See Taylor v. Teco Barge Line, Inc., 517 F.3d 372, 387 (6th Cir. 2008)* ("A party needs only a slim amount of evidence to support giving a jury instruction . . . .")

IV.

By denying the Union's request for an instruction on the policy's *Finnegan* clause, the district court, in essence, **[**45]** ruled that the Union's argument that it legally terminated Ardingo in accordance with said clause failed as a matter of law only for failure to *produce* sufficient evidence to support that conclusion, because plenty of evidence in the record, produced by Ardingo, suggested that the Union terminated him for his political opposition. The question then becomes: does Ardingo deserve summary disposition on this issue or should the district court have submitted it to the jury, simply because he, not the Union, produced the relevant evidence?

The theory of Ardingo's termination as political opposition could either fit into the legal framework given above as one of the Union's legal reasons for termination, or as one of Ardingo's showings of pretext. Either Ardingo refuted the Union's economic necessity rationale by arguing both lack of economic necessity and political-opposition termination, or the Union put forth economic necessity and political opposition as legal reasons for termination and Ardingo refuted both. No doubt the majority states correctly that the Union failed to produce evidence of political opposition, so that it did not put forth political opposition as a lawful ground for **[**46]** termination alongside its economic necessity argument. Ardingo, not the Union, injected political opposition into the case to show pretext; the law burdens him with production on his theories of pretext. In short, a proffered "theory of the case" encompasses more than the evidence a party produces, particularly when the law tasks the opposing party with the burden of production.

The district court allowed the jury to decide whether economic necessity was a pretextual reason for Ardingo's termination because the Union actually terminated Ardingo in accordance with some other unlawful reason. To decide that issue is to decide that the Union had not terminated Ardingo in accordance with the *Finnegan* clause, a lawful grounds for termination. Ardingo put forth the larger issue of pretext that included the narrower issue of political opposition to support his position. Ardingo's entitlement to have his political opposition theory get before the jury to respond to the Union's economic necessity argument then implies the same for the Union's *Finnegan-clause* argument. Summary disposition of the *Finnegan-clause* issue in Ardingo's favor does not follow when ample evidence in the record existed, **[**47]** produced by Ardingo and gestured at by the Union, to conclude in the Union's favor.

V.

Abundant evidence of political opposition existed. The Union attempted to argue the theory that even if economic necessity was a pretextual reason for Ardingo's termination because the Union actually terminated him for political opposition, such a termination would be legal as well. The **[*947]** jury instructions were prejudicial. [2] For the foregoing reasons, the Union deserved a jury instruction on *Finnegan,* and so, I would reverse the judgment of the district court and remand for a new trial.

2 The majority argues that no prejudice existed because the district court admitted the just-cause policy into evidence and read the Supreme Court's holding in *Finnegan* to the jury during Potter's direct testimony. Maj. Op. at 16. This ignores that the district court gave the following jury instructions:

> In order for you to decide whether there was a good or just cause for the termination of plaintiff's employment under defendant's policy you must determine whether defendant was actually in financial circumstances necessitating a reduction in its work force, and whether that circumstance was the actual reason for termination **[**48]** of plaintiff's employment.
>
> If defendant was not in circumstances requiring a reduction in its work force or if that was not the actual reason for plaintiff's termination then there was not good or just cause for termination.

These instructions render the policy's *Finnegan* clause inoperative as far as the jury is concerned.